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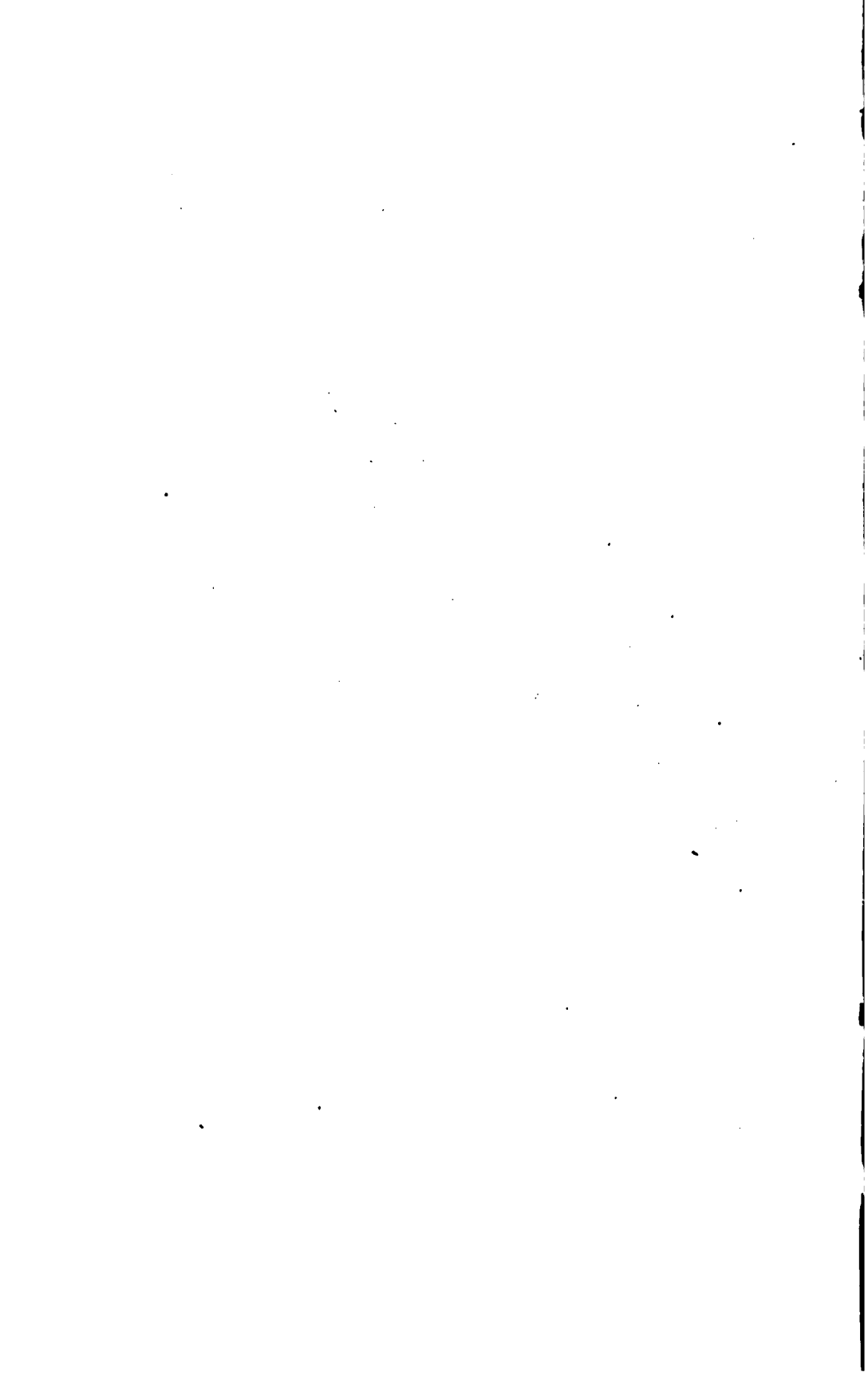
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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

Gr. Brit. Court of

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, F. FISHER, AND H. CADMAN JONES,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

[THE NUMERALS REFER TO THE MARGINAL PAGES.]

	Page
Allanson v. Doulsen	477-479
Alsop, <i>Ex parte</i> , <i>In re</i> Rees	289
Arundell, Clifford v.	307
Armstrong v. Armstrong	640
Atkins v. Revell	360
Audsley v. Horn	226
Barrow, Morrison v.	633
Barwell, Ennor v.	529
Bill v. The Sierra Nevada Lake Water and Mining Company	177
Bishop, Obee v.	137
Boldero v. The East India Company	313
Bowes, Ingleby v.	487
Brierley, Fisher v.	643
Camm, Goulder v.	146
Cant's Estate, <i>In re</i>	153
Carver v. Richards	548
Chapman, Heather v.	486
Chard, Wright v.	567
Clarke, Hodgson v.	394
Penny v.	425
Clifford v. Arundell	307
Clifton v. Jackson	484
Colne Valley and Halstead Railway Bill, <i>Ex parte</i>	53

	Page
Conybeare v. The New Brunswick and Canada Railway and Land Company	578
Cooper v. Joel	240
Croucher, Slim v.	518
 Dance, <i>Ex parte</i> , <i>In re</i> Dance	 286
Davies, Williamson v.	480
Doulben, Allanson v.	477-479
 East India Company, Boldero v.	 313
Eastern Union and Harwich Railway and Pier Act, <i>In re</i>	153
Edmonds, Moulton v.	246
Ennor v. Barwell	529
Enohin, Wylie v.	410
Enstick, Fancock v.	488
 Faden, Varlo v.	 211
Fancock v. Enstick	488
Fisher v. Brierley	643
Frampton, <i>Ex parte</i> , <i>In re</i> Frampton	263
Fuller, Williams v.	481-483
 Gandy, Wills v.	 13
Harris v.	13
Glyn v. Hood.	334
Goldschmidt, Thiedemann v.	4
Goodwin, Grice v.	484
Goodyear, Murrell v.	432
Gordon, <i>In re</i>	381
Goulder v. Camm	146
Green v. Jenkins	454
Grice v. Goodwin	484
Guedalla, Montefiore v.	93
Guion v. Trask	373
 Hamilton, Walker v.	 602
Harman, Offen v.	253

TABLE OF CASES REPORTED.

vii

	Page
Harris v. Gandy	13
Sherrington v.	481
Harrowby (the Earl of), Johnstone v.	183
Heath, Loxley v.	489
Heather v. Chapman	486
Hele v. Worthington	485
Hodgson v. Clarke	394
Holderness, <i>Ex parte</i> , <i>In re</i> Holderness	260
Hood, Glyn v.	334
Horn, Audsley v.	226
Hyam's Case, <i>In re</i> The Mexican and South American Company	75
 Ingleby v. Bowes	 487
 Jackson, Clifton v.	 484
Jenkins, Green v.	454
Joel, Cooper v.	240
Johnstone v. The Earl of Harrowby	183
 Lambarde v. Turton	 495
Turton v.	495
Lindsay, Pearce v.	573
London and Birmingham Flint Glass and Alkali Company, <i>In re</i> <i>Ex parte</i> Wright	257
London and Eastern Banking Corporation, <i>In re</i> , Longworth's Executor's Case	17
Longworth's Executor's Case, <i>In re</i> The London and Eastern Banking Corporation	17
Loxley v. Heath	489
Loyd, Venning v.	193
Luard's Case, <i>In re</i> Northumberland and Durham District Bank- ing Company	533
 M'Gregor v. M'Gregor	 63
M'Kean's Patent, <i>In re</i>	2
Makings v. Makings	355
Mexican and South American Company, <i>In re</i> , Hyam's Case	75
Montefiore v. Guedalla	93

	Page
Morrison <i>v.</i> Barrow	633
Moulton <i>v.</i> Edmonds	246
Muggeridge <i>v.</i> Stanton	107
Murrell <i>v.</i> Goodyear	432
Nelson <i>v.</i> Seaman	368
New Brunswick and Canada Railway and Land Company, Cony- beare <i>v.</i>	578
Nicholson, <i>Ex parte, In re</i> Nicholson	270
Northumberland and Durham District Banking Company, <i>In re</i> , Luard's Case	533
Oades <i>v.</i> Viguers	476
Obee <i>v.</i> Bishop	137
Offen <i>v.</i> Harman	253
Parish <i>v.</i> Sleeman	326
Pearce <i>v.</i> Lindsay	578
Pendleton <i>v.</i> Rooth	81
Penny <i>v.</i> Clarke	425
Perrins, <i>Ex parte, In re</i> Perrins	299
Perry <i>v.</i> Phelps	488
Piggott <i>v.</i> Stratton	33
Pilkington, Smith <i>v.</i>	120
Price <i>v.</i> Watkins	487
Rees, <i>In re, Ex parte</i> Alsop	289
Revell, Atkins <i>v.</i>	360
Richards, Carver <i>v.</i>	548
Rooth, Pendleton <i>v.</i>	81
Seaman, Nelson <i>v.</i>	368
Shakespear, Thomson <i>v.</i>	399
Sherrington <i>v.</i> Harris	481
Sierra Nevada Lake Water and Mining Company, Bill <i>v.</i>	177
Sleeman, Parish <i>v.</i>	326
Slim <i>v.</i> Croucher	518

TABLE OF CASES REPORTED.

ix

	Page
Smith v. Pilkington	120
Stanton, Muggeridge v.	107
Stratton, Piggott v.	33
Swift v. Swift	160
Thiedemann v. Goldschmidt	4
Thomson v. Shakespear	399
Trask, Guion v.	373
Turton v. Lambarde	495
Lambarde v.	495
Tyrone (The Earl of) v. The Marquis of Waterford	613
Varlo v. Faden	211
Venning v. Loyd	193
Vigures, Oades v.	476
Walker v. Hamilton	602
Waterford (The Marquis of), The Earl of Tyrone v.	613
Watkins, Price v.	487
Western Bank of Scotland, <i>In re</i>	1
Williams v. Fuller	481-483
Williamson v. Davies	480
Wills v. Gandy	13
Wood, <i>In re</i>	142
Worthington, Hele v.	485
Wright v. Chard	567
<i>Ex parte, In re</i> The London and Birmingham Flint Glass and Alkali Company	257
Wylie v. Wylie	410
v. Enohin	410



INDEX OF CASES CITED.

[THE NUMERALS REFER TO THE MARGINAL PAGING.]

A.		B.	
	Page		Page
Adams v. Adams	423	Bacon v. Jones	633
v. Jones	395	Baggett v. Meux	149
Addis v. Clement	165, 168, 173	Bailey v. Murin	464
Adey v. Arnold	140	Baillie v. Baillie	205
Albee v. Carpenter	236	Baker v. Bradley	146
Alexander v. Crosby	247	Baldwin v. Baldwin	653
Allanson v. Doulsen	477, 479	Barker v. Barker	428, 429
Allen v. Kemble	608	Barkworth v. Young	490
American Bank v. Rollins	193	Barnaby v. Bardsley	651
Amies v. Skillern	67, 68, 69, 428, 430	Barnam v. McDaniels	454
Anderson v. Fitzgerald	40	Barnard v. Lee	432
Andrews v. Lyons	49	Barrington v. Liddell	218, 220, 224
Angas's Case	538	Barry v. Croskey	518
Ansdell v. Ansdell	633	Bartlett v. Fifield	454
Antrobus v. Davidson	365	Barton's Case	591
Archer v. Harrison	128	Bateman v. Davis	256, 555
Armstrong v. Armstrong	226, 639	v. Roach	69, 70, 74
Arnold v. Arnold	618	Battley v. Faulkner	490
Arnot v. Biscoe	523	Beaufort, Duke of v. Neeld	635
Ashton v. Horsfield	625	Beaumont v. Oliveira	399
Askham v. Barker	555, 556, 558,	Bengough v. Walker	104
Atcherly v. Vernon	149	Bennett's Case	596
Athenæum Life Ass. Soc. v. Pooley	591	Bennett v. Judson	578
Att.-Gen. v. Bricknell	651, 654	v. Merriman	427, 429
v. Chambers	530	v. Womack	329, 330, 333
v. Chester, Bishop of	651,	Bennett's Trust, <i>In re</i>	429
	655	Bennitt v. Whitehouse	530
v. Mill	653	Beresford v. Armagh	615
v. Munby	650	Beverley Case	601
v. Munro	575, 576	Bibby v. Thompson	226
v. Poulden	651, 654, 659	Bibin v. Walker	415
v. Stepney	405, 409	Birch v. Sherratt	307
v. Whitchurch	409	Birkenhead Docks, Trustees of v.	
v. Wiggaston	129	Laird	231
Attwood v. Small	578	Blacklow v. Laws	148
Audsley v. Horn	613, 617	Blair v. Bromley	523

	Page		Page
Blake v. Marnell	555	Central Railway Co. of Venezuela	
Blunt v. Halliday	322, 325	v. Kisch	578
Bold v. Hutchinson	490	Chalmers v. Storrell	416
Bonser v. Bradshaw	633	Chancey's Case	93
Bovill v. Hitchcock	633	Chandlee v. Price	229
Bowditch v. Soltyk	417	Chapman v. Brown	655
Bowers v. Johnson	578	Chappell v. Purday	156
Bowne v. Joy	193	Charles River Bridge v. Warren	
Bradbury v. Wright	329, 330, 333	Bridge	633
Bradley v. Bevington	633	Charlton v. Craven	618
v. Hale	75, 79, 80	v. Lowe	140
Bradshaw v. Bradshaw	396	Christie v. Unwin	391
Brereton v. Hutchinson	142	Church v. Brown	331
Brewer v. Cox	110	Claggett's Case	391
Bridge v. Yates	67, 68, 69, 428,	Clare Hall v. Harding	523
	480	Claridge v. Dalton	343
Briggs v. Penny	403	Clarke v. Dickson	591
British Museum, Trustees of the v.		Clifford v. Brooke	523
White	404	Clifton v. Jackson	484
Brittlebank v. Goodwin	137	Cockburn v. Peel	53
Brockwell's Case	591	Cocks v. Manners	399
Brown v. Maffey	343	Coddington v. Goddard	578
v. Savage	518	Coe v. Bigg	63, 425
Brummet v. Barber	237	Coles v. Sims	33
Bryant v. Busk	247	Collier v. Jenkins	555
Brydges' v. Sir Brook, Case	413, 416	Colt v. Partridge	193
Buffar v. Bradford	229, 232, 238,	Colyer v. Finch	247
	617	Concord Bank v. Gregg	578
Bullock v. Stones	517	Conron v. Conron	502
Bunbury v. Bunbury	200	Cook v. Fountain	116
Bundine v. Shelton	454	Cookson v. Hancock	189
Burlinson's Case	538, 540	Cooper v. Day	187
Burnes v. Pennell	578	v. Emery	247
Burrell v. Baskerfield	230, 238	v. Waldegrave, Earl of	606
v. Egremont, Earl of	183	Corbyn v. French	655
Burrowes v. Lock	521, 524, 526	Coussmaker v. Sewell	247
Burt v. Sturt	222	Coventry v. Chichester	93
Bushby v. Munday	200, 205	Cowne v. Douglas	87
Butcher v. Jackson	556	Cowper v. Green	365
Byng v. Byng	236	Cox v. Jackson	75, 79 80
		v. Mitchell	193
		Cradock v. Cradock	70
		Cramp v. Playfoot	655
		Cranston v. Clarke	330, 331, 333
		Crawford v. Trotter	233, 234, 617
		Cresswell v. Cresswell	183
		Crockett v. Crockett	233
		Crone v. Odell	616
		Crowder v. Clowes	186, 187, 191
		Crowley's Case	462
		Crowther, <i>Ex parte</i>	268
		Crozier v. Crozier	556
		Crumble v. Jones	630
		Crumph v. United States Mining Co.	578
		Cunningham v. Murray	622
		Currie v. Gould	67
		Custar v. Titusville Water & Gas	
		Co.	578

D.		Page			Page
Dabbs v. Dabbs		633	Dunne v. Doran		142
Dalzell v. Welch		68	Durham, Earl of v. Wharton	93, 98	
Dann v. Spurrier		523	Dutton v. Morrison		296
Dashiell v. Dashiell		237	E.		
Davenport's Case	38, 46		Eames v. Eames		633
Davenport v. Goldberg		633	Eardley v. Owen		222
Davis v. Dysart, Earl of	574		East India Company v. Kynaston	529	
v. The Trustees of the Ma-			v. Robertson	316,	
dras Civil Service An-	316, 323			324	
nuity Fund			East Tenn. Railroad Co. v. Gam-		
Dawson v. Bourne	233, 234		mon		578
v. Dawson		93	Eaton v. Dickinson		454
v. Morgan		606	Eccles v. Cheyne		490
Day v. Croft	186, 187		Edwards v. Hall	653, 663	
De Beil v. Thomson	489, 492		v. M'Leary	523, 595	
Dehon v. Foster		205	Eichelberger v. Bernetz		237
Del Mare v. Rebello		394	Elliott v. Minto, Lord	200, 205	
Denton v. Stewart		522	Ellis v. Selby		404
De Pass's Case		76	Elwell v. Chamberlain		578
Derbyshire, Staffordshire, and			England v. Downes		416
Warwickshire Railway Co. v.			Ernest v. Nicholls	591, 596	
Serrell	243		Esdaile v. Sowerby		343
Devonshire, Duke of v. Eglin		635	Evans v. Bicknell	38, 521, 525, 528	
De Witte v. De Witte		226	v. Clement	454, 465	
Dexter v. Arnold		454	v. Drummond		376
Dickinson v. Grand Junction Ca-			Ewing v. Osbaldiston		24, 25
nal Company	41		Eyre v. Marsden	220, 427, 429	
Dipple v. Corles		116	F.		
Di Sora v. Phillips		417	Fancock v. Enstick		488
Dixon v. Olmius	149, 150		Farmer v. Martin	555, 556	
Dodgson v. Bell	539, 540, 541		v. Smith		128
Doe v. Heneage	505, 506, 516		Farnham v. Phillips	97, 101, 104	
v. Hicks		504	Fisher v. Hepburn		413
v. Lucan		168	Fisk v. Norton	369, 370, 371	
v. Pyke	38, 41		Fitzsimmons v. Joslin		578
Doe d. Beadon v. Pyke		46	Fleming v. Self	120, 126, 127, 129,	
Bellasyse v. Lucan, Earl of	165		132, 134, 135, 136		
Burrin v. Charlton		618	Fletcher v. Fletcher		116
Garrod v. Garrod		621	v. Stevenson	221, 225	
Jones v. Davies		621	Foster's Case		462
Le Chevalier v. Huthwaite	396		Francis v. Rucker	606, 607, 610, 611,	
Phipps v. Mulgrave, Lord	618,		612		
620, 623, 624			Franco v. Bolton		244
Rogers v. Brooks		247	Freeman v. Cooke		39
Tennyson v. Yarborough,			Freemantle v. Bankes	97, 98, 99, 101,	
Lord	462, 463		104		
Thompson v. Pitcher		651	Freer v. Hesse		256
Webb v. Dixon		331	French v. French		233
Dougherty v. Morgan		454	Froggatt v. Wardell	233, 234	
Doughty v. Bowman	37, 44		Fromow, <i>Re</i>		53
Downing College Case		652	Frost v. Ward		13
Drake v. Drake (No 2)		897	v. Wood		13
Drant v. Vause		88			
Dressel v. Jordan		432			
Duffort v. Arrowsmith		14			
Dugan v. Hollins	102, 105				
Duke v. Lacy		229			

G.		Page		Page
Gardiner, <i>Ex parte</i> , <i>Re</i> Eastern Counties Railway Company	156		Hayward v. Dimsdale	244
Garlick v. Lawson	233		Head v. Randall	70
Garrett v. Evers	88		v. Teynham, Lord	371, 372
Gee v. Manchester, Corporation of	503		Heasman v. Pearse	63, 425
Geiger v. Brown	237		Heathcote v. North Staffordshire Railway Co.	177
Genery v. Fitzgerald	517		Heather v. Chapman	486
George v. Whitmore	639		Hele v. Worthington	485
Getzler v. Saroni	454		Helsham v. Langley	635
Giffard <i>Ex parte</i>	365		Henderson v. Railroad Co.	578
Gill's Estate	93, 100, 101		v. Runcorn Soap and Alkali Co.	633
Ginger v. White	622, 630		Heriot's Hospital	43
Glendinning <i>Ex parte</i>	365		Heron v. Stokes	621
Goodall v. Marshall	193		Hester v. Memphis, &c., Railroad Co.	578
Goodman v. Edwards	165		Heward v. Wheatley	542, 543
Gosling v. Gosling	116, 220		Hicks v. Sallitt	570
Gough v. Bult	141		Hill v. Lane	518
Gourlay v. Somerset, Duke of	635		Hillary v. Waller	247
Gouthwaite's Case	542, 543		Hine v. Hine	93, 102, 105
Graham v. Maxwell	205		Hoare v. Byng	226
Green v. Briggs	376, 575		Hobson v. Blackburn	165, 168
v. Pulsford	557		Hodges v. Grant	425
Greenaway v. Adams	522		Hoitt v. Burleigh	633
Greenville v. Seymour	177		Holderness v. Shackels	376
Greenwood v. Sutherland	233		Hollingsworth v. McDonald	454
v. Tyber	619		Holman v. Riddle	454
Gregor v. Kemp	490		Holmes v. Custance	394
Gregory v. Mighell	635		v. Eastern Counties Railway Co.	635
Gregson v. Hindley	88		Holthouse, <i>Ex parte</i>	281
Grice v. Goodwin	462, 484		Honner v. Morton	553
Grieve v. Grieve	226, 236		Hooley v. Hatton	189
Grievess v. Case	650		Hope v. Carnegie	205
Grisewood and Smith's Case	75		Hore's Estate, <i>Re</i>	156
Griswold v. Haven	578		Horsfield v. Ashton	625
H.			Howard v. Baillie	267, 268
Hadley v. Baxendale	608		Howell v. George	443
Haig v. Homan	454		Howston v. Ives	229
Hale v. Hale	32		Hughes v. Stubbs	116
Hall v. Franklin	26		Hulme v. Tenant	146
v. Priest	236		Hunt, <i>Ex parte</i>	75
Hammersley v. De Beil	489, 492		Hurst v. Beach	185
Hamp v. Hamp	633		Hutton v. Rossiter	49, 518
Hannan v. Osborne	237		I.	
Harnett v. Yielding	635		Incorporated Society v. Coles	652
Harris v. Gandy	14		Ingleby v. Bowes	487
Harrison v. Guest	649		J.	
v. Hollins	87		Jackman v. Mitchell	244
v. Nixon	417		Jackson v. Jackson	555
Hartley v. Hurle	148, 165, 168		v. Leaf	14
Harvey, <i>Ex parte</i>	364			
Hatch v. Spofford	193			
Hauberger v. Root	93			
Hawkins v. Hawkins	355, 358			
v. Kemp	256			

INDEX OF CASES CITED.

XV

	Page		Page
James v. Mason	101	Lewis v. Jones	365
Jeffery v. De Vitre	233, 234	v. Thomas	638
Jenkins v. Bushby	633	Lickbarrow v. Mason	9
v. Green	454, 460	Limbrey v. Gurr	654, 659
Jennings v. Broughton	518	Lincoln, Lady v. Newcastle, Duke of	239
Jesson v. Wright	618	Linzee v. Mixer	33
Jessop's Case	76	Litchfield Bank v. Peck	578
Johnson v. Hainesworth	633	Littlewood v. Collins	13
v. Johnson	490	Lloyd v. London, Chatham, and Dover Railway Co.	33
Johnston v. Antrobus	503	Loftus v. Swift	358
Jones v. Mason	93	Logan v. Wienholt	490
v. Ryde	9	London and North Western Rail- way Co. v. Lindsay	200
v. Taylor	432	London, University of v. Yarrow	405
Jordan v. Fortescue	415	Lonsdale, Earl of v. Curwen	580
Jorden v. Money	33, 38, 39, 40, 42, 51, 52	Love v. Blewit	454
K.		Lowther v. Cavendish	165
Kampf v. Jones	219	Lucas v. Goldsmid	613
Kay v. Crook	490	Luders v. Anstey	490
Kearsley v. Cole	365	Ludlow v. Kidd	454
Kennedy v. Sedgwick	69	Lyon v. Coward	429
Kenworthy v. Ward	67	v. Michell	229
Kindley v. Gray	432	M.	
King v. Malcott	365	M'Fadden v. Jenkyns	116
v. Melling	618	M'Gregor v. M'Gregor	425, 427, 429
v. Tootel	183	M'Intyre v. Belcher	46
Kirk v. Eddowes	99	M'Queen v. Farquhar	256, 557
v. Paulin	149, 150	Mair v. Quilter	429
Knapp v. Abell	417	Malone v. Gerachty	371
Knight v. Ellis	232	Mandeville's Case	568, 620, 621
Knotsford v. Gardner	165	Manico, Ex parte	281
L.		Mann v. Fuller	189
Lake v. Brutton	365	Marco v. Low	205
Lambarde v. Peach	502, 505	Margetts v. Barringer	149, 150
v. Turton	506	Marshall v. Wisdala	329
Lancaster v. Ward	633	Marston v. Brackett	633
Lane, Ex parte	268	Mason v. Clarke	618
v. Stanhope	165, 168	v. Crosby	578
v. Stanhope, Earl of	173	Massey v. Parker	147
Langdale, Lady v. Briggs	220	Maunsell v. White	490
Langdon v. Astor	101	Melling v. Bird	156
Langford's Trusts, Re	53	Mellish v. Mellish	618, 620
Langton v. Hughes	23	v. Williams	454, 461
Lawe v. Davies	617	Mence v. Bagster	67
Lawless v. Mansfield	442	Merrill v. New England Insurance Co.	193
Lawrence v. Fletcher	89	Meux's Executor's Case	578
v. Hand	578	Middleton v. Messenger	69
Leacroft v. Maynard	186; 190	v. Sherburne	633
Leather v. Simpson	4, 518	Midland Railway Company v. Brown	574, 576
Lee v. Pain	186	Miller v. Huddleston	310
v. Frieaux	149, 150	v. Rowan	399
v. Rowley	391		
Legge v. Thorp	343		

	Page
Milnes v. Gery	635
Miner v. Atherton	98, 100, 101
Mitchell v. Cockburn	23, 24
v. Mims	578
Moffat v. Strong	237
Monypenny v. Monypenny	40, 47
Moore, <i>Ex parte</i>	611
Moore, <i>Ex parte</i> , <i>Re</i> Tyler	606, 607
Moorhouse v. Colvin	490
More v. Smedburgh	432
More's Trust, <i>In re</i>	620
Morgan v. Morgan	89
Morice v. Durham, Bishop of	405
Morrice v. Langham	505, 506
Morse v. Morse	234
v. Tucker	221, 225
Mortimer v. Moffat	237
Morton v. Scull	578
Mosley v. Baker	132
Mounsey v. Burnham	635
Mower v. Orr	490
Mullings v. Trinder	470
Mundorf v. Wickersham	578
Mure <i>Ex parte</i>	344, 346, 348
Murrell v. Goodyear	470
v. Norton	438

N.

Napier v. Schneider	606, 611
National Insurance and Investment Co., <i>Re</i>	75
National Exchange Co. v. Drew	578, 591
Neap v. Abbott	635
Neathway v. Reed	148
Nesbitt <i>Re</i>	144
Ness v. Angas	539, 542
Nevin v. Drysdale	93
New Brunswick, &c., Railway, &c., Co. v. Conybeare	578
Newill v. Newill	226
New Orleans G. L. & B. Co. v. Dudley	633
Newport v. Bryan	142
Newton v. Griffith	237
Nicoll's Case	28, 578, 591, 596
North British Railway Company v. Tod	40
Nouaille v. Greenwood	247
Noys v. Mordaunt	88

O.

Oades v. Vigures	476
Oakes v. Turquand	578

	Page
Oates <i>d. Hatterley v. Jackson</i>	67
O'Brien <i>v. Bowes</i>	638
<i>v. Connor</i>	464, 473
Oddie <i>v. Woodford</i>	617
Ongley <i>v. Peale</i>	617
Orr <i>v. Magennis</i>	343
Ostell <i>v. Lepage</i>	200
Owen <i>v. Penny</i>	70
Owen's Trusts, <i>In re</i>	226

P.

Page v. May	129
Paine v. Wagner	233
Parker, <i>Ex parte</i>	78
v. Nightingale	33
Partridge v. Osborne	523
Partyn v. Roberts	490
Pasley v. Freeman	525
Passmore v. Huggins	416
Pearce v. Creswick	523
Pennel v. Roy	200, 205
Perry v. Phelps	461, 465, 471, 473,
	488
P. & M. Bank v. Dundas	454
Philpot v. St. George's Hospital	653
Phipps v. Mulgrave, Lord	618, 620
Pickard v. Sears	40, 49
Pistol v. Riccardson	165, 168
Playfair v. Cooper	141
Platell v. Beville	443
Pollard, <i>Re</i>	613
Price v. Barker	365
v. Macaulay	518
v. Watkins	487
Prichard v. Ames	149
Pride v. Fooks	616
Prosser v. Watts	247
Prowitt v. Rodman	627
Pulsford v. Richards	523
Pulteney v. Warren	571
Purcell v. McCleary	432
Pym v. Lockyer	97, 100, 103, 105
Pyke v. Waddingham	469, 555

Q.

Quarrel v. Beckford 136

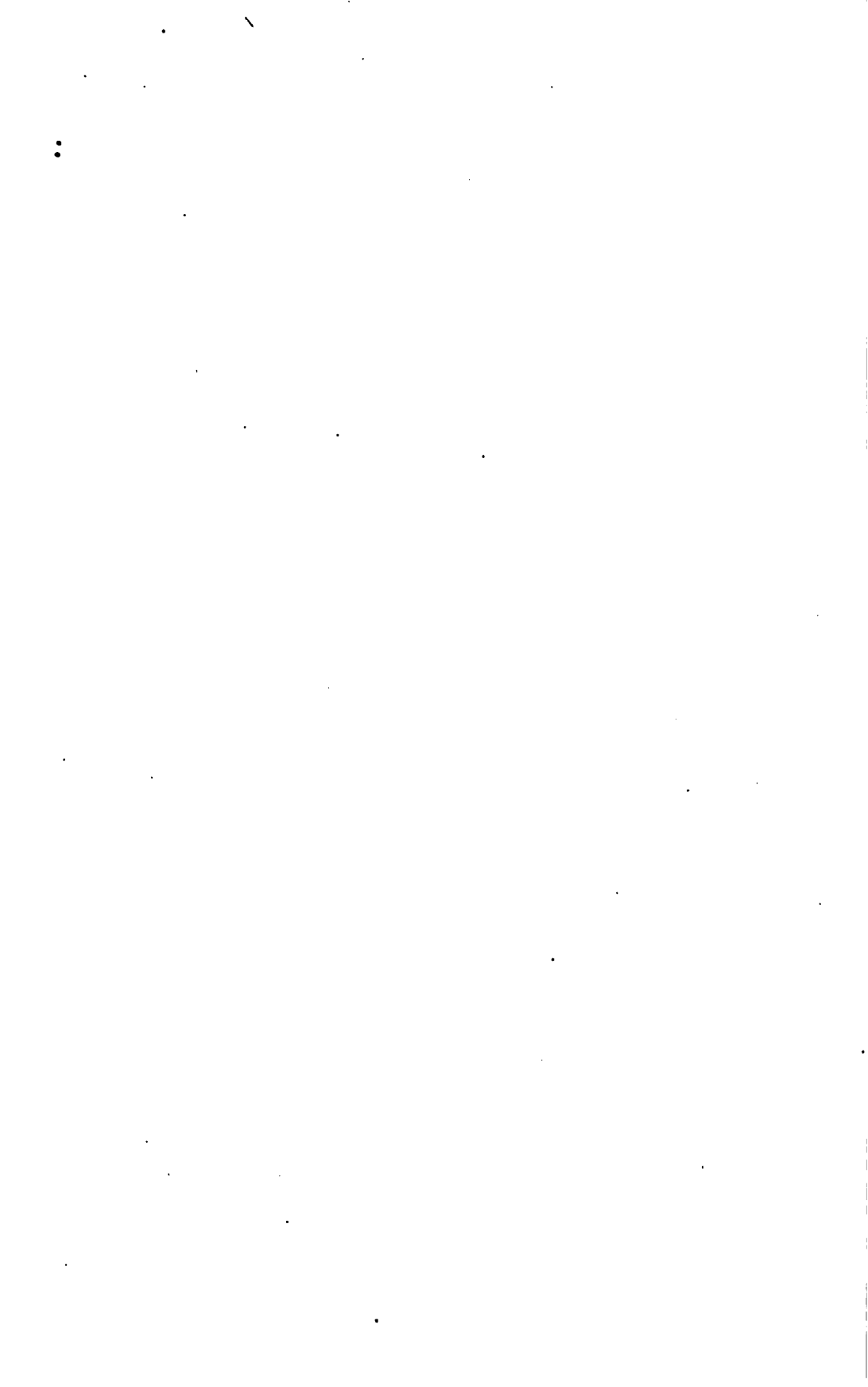
R.

Raffety v. King	87
Ramshire v. Bolton	518
Ranger v. Great Western Railway Co.	578

	Page		Page
Rawlins v. Wickham	518, 521, 523, 578, 591	Shrewsbury and Birmingham Railway Co. v. London and North-western Railway Co.	596
Reed v. White	376	Shuttleworth v. Howarth	169
Reeves v. Dickey	432	Sibley v. Perry	67, 68
Rex v. Loxdale	464	Sidney v. Shelley	506, 517
Reynell v. Sprye	578	Simmons v. Norton	464, 468
Reynoldson v. Perkins	86	Simpson v. Howden, Lord	244
Rhodes, <i>Ex parte</i>	268	Sims v. Sims	93, 101
v. Barret	13	Skey v. Barnes	219
Richards v. Humphreys	93	Slingsby v. Grainger	410
v. Syms	38	Smith v. Anderson	329, 330
Richmond v. Gray	432	v. Effingham	574
Rickman v. Morgan	104	v. Effingham, Earl of	573, 575
Ridgeway v. Munkittrick	616	v. Lathrop	193
Ridgway v. Wharton	40	v. Palmer	429
Ring v. Hardwick	219	v. Reese River Co.	578
River v. Plankroad Co.	578	v. Smith	88
Roberts v. Croft	247	Spong v. Spong	503
v. Weatherford	93	Squire v. Campbell	40, 42, 43
Robertson v. East India Company	316, 323	Stanley v. Stanley	505, 517
Robinson v. Hicks	620	v. Wise	429
v. Reynolds	7, 9, 10, 11	Stansfield v. Hobson	87
v. Robinson	620, 621	Steedman v. Poole	149
Roddam v. Morley	87	Stevens v. Hey	454
Roddy v. Fitzgerald	618	v. South Devon Railway Co.	180
Roe v. Vernon	414, 417	Stockbridge Iron Co. v. Hudson Iron Co.	633
Rogers v. French	101	Stokes v. Heron	229, 232, 236, 237, 613
Rose v. Bartlett	166, 167, 171	Story v. Gape	137
Roskell v. Whitworth	633	Straffon's Executors' Case	542, 543
Ross v. Ross	68	Stratton v. Best	67
Rowland v. Morgan	239, 617	Stray, <i>Ex parte</i>	289
Rucker v. Hiller	343	<i>In re</i>	289
Rufford, <i>Ex parte</i>	281	Sturgess v. Pearson	69
Russell v. Dickson	183	Sturt, <i>Ex parte</i>	281
v. Dixon	189	Suisae v. Lowther, Lord	186
Ryan v. Mackmath	244	Swale v. Swale	14
		Swayne v. Lyon	247
		Swoope's Appeal	105
S.			
Sadler's Case	538		
Sainsbury v. Jones	522		
St. George's Steam Packet Company, <i>Re</i>	221	T.	
Sammes's Case	67	Talbot v. Seeman	417
Saum v. Stingley	454	Tarleton, <i>Ex parte</i>	268
Saward v. Arstey	38, 41	Tavener, <i>Ex parte</i>	256
Scott v. Dixon	591	Taylor v. Brown	442
v. Price	237	Tench v. Cheese	220
v. Seymour	193	Terry v. Parker	342, 344
Seagrave v. Pope	128, 129, 132	Thiedemann v. Goldschmidt	243
Seguin v. Maverick	454	Thomas v. Thomas	570
Shaftesbury, Earl of v. Marlborough, Duke of	187, 192	Thompson v. Lawley	165, 167, 168
Shaw v. Norfolk County Railroad Co.	633	v. Lawley, Lady	173
Sherrington v. Harris	481	v. Percival	376
		Thompson's Trust, <i>Re</i>	69

	Page		Page
Thornhill v. Hall	504	Watson v. Lincoln, Earl of	97, 104
Thornton v. Knight	243	v. Marston	635
Thynne, Lady Edward v. Glengall		Way v. East	649, 650, 654, 661
Earl of	97, 98, 99, 101, 103	Webb, <i>Re</i>	144
Tibbetts v. Perkins	633	v. Byng	617, 620
Todd v. Gee	522	v. Hewitt	365
Tomlinson, <i>Ex parte</i>	144	v. Peel	454
Tommey v. White	454	West v. Lawday	410
Torre v. Browne	310	Westall v. Austin	432
Townley v. Bedwell	403	Westcott v. Cady	237
v. Deane	633	Weston's Case	75, 78
Townshend, Lord v. Stangroom	635	Whateley v. Spooner	416
Trulock v. Roby	461, 465, 466, 471, 473	Whicker v. Hume	399
Turner v. Coffin	49	Whipple v. Robbins	193
v. Husler	165, 173	Whitfield v. Savage	343
Turton v. Lambarde	506	Whiting v. United States Bank	454
Tyler v. Lake	147, 149, 150	Whittaker, <i>In re</i>	144
Tyrrell v. Hope	149, 150	Wild's Case	226, 228, 229, 231, 232, 236, 237, 238, 616, 619, 621
Tyson v. Smith	432	Wilkes, <i>Ex parte</i>	296
		Williams v. Fuller	481, 483
		v. Kershaw	405
U.		Williamson v. Davies	480
Udell v. Atherton	578	Wills v. Gandy	14, 15, 16
Uhfelder v. Levy	205	Wilson v. Eden	171
		v. Knubley	220
		v. O'Leary	183
V.		Windsmore v. Hubbard	618
Vanderberg v. Palmer	116	Winter v. Winter	490
Veazie v. Williams	578	Wisden v. Wisden	490
Veitch v. Trustees of the Exeter Turnpike Roads	653	Woodgate v. Unwin	67, 69, 70, 71, 72, 73, 74
		Woodhouse v. Woodhouse	137
		Woolsey v. D. Crawford	606, 611
		Wright v. Vernon	569
		v. Wakeford	256
W.		Wrixon v. Vize	358
Wade v. Paget	555	Wyke v. Rogers	364, 365
Waite v. Coombes	416	Wynch's, <i>Ex parte</i>	229
Walker v. Fletcher	530		
Wallace v. McConnell	193	Y.	
Walshe v. Provan	376	Yates v. Thompson	417
Ward v. Hill	633	Young v. Henderson	454
Ware v. Grand Junction Water-works Company	181	v. Shepherd	617
Waring v. Coventry	355, 359	v. Waud	296
Warwick v. Hawkins	183		
Waterman v. Dutton	633	Z.	
Watson's Case	462	Zeiter v. Zeiter	93
Watson v. Humphrey	391		

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.



REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

In the Matter of The WESTERN BANK OF SCOTLAND.

1859. November 2. Before the Lord Chancellor Lord CAMPBELL.

Order made *ex parte*, under 21 & 22 Vict. c. 60, §§ 12, 13, for the enrolment of an order of the Court of Session in Scotland directing payment by contributories of a sum of money, or in default attachment.

THIS was an application, *ex parte*, under the sects. 12 and 13 of the Statute 21 & 22 Vict. c. 60, which provide that orders made in the Court of Session in Scotland, in the course of winding up a company, shall be enforced in England by the Courts which would have had jurisdiction if the registered office of the company were established in England, and in such manner in all respects as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction; and that the last-mentioned Court shall cause such order to be registered, or shall take such other steps in the matter as may be requisite for enforcing the order as if it were the order of the Court enforcing the same. The present application was to have an order of the Court of Session directing certain *shareholders in the above-men- *2 tioned company to pay a sum of money as contributories, or in default the attachment of their persons and their estate and goods might be enrolled in this Court.

The order had been passed and entered at the Rolls.

Mr. C. Swanston, in support of the application, said that it was mentioned to the Court as being the first case which had occurred under the Act, and on account of the Act not expressly directing enrolment.

The Lord Chancellor, after conferring with the registrar as to the propriety of the application being made *ex parte*, made the order.

In another case of an order made in the matter of the same company, his Lordship declined to direct the enrolment until the order had been passed and entered, but this having been done, the order was subsequently made.

In the Matter of M'KEAN'S PATENT.

1859. November 2. Before the Lord Chancellor Lord CAMPBELL.

Where a petition to have the great seal affixed to a patent had been filed, and the respondents served with notice two months before the first day of Michaelmas term, for which day the petition was answered, and the respondents only filed affidavits on the morning of that day: *Held*, that they could not be read; and the patent was ordered to be sealed.

THIS was a petition to have the great seal affixed to a patent. The petition was answered in September for November 2, and on the 3d September notice was given to the respondent, who did not file any affidavits in opposition till the morning of November 2.

* 8 * *Mr. Hindmarch* and *Mr. Druce*, in support of the petition, submitted that the affidavits had been filed too late to be replied to, and could not be read.

Mr. Karslake, for the respondent. — If the petitioner requires time to answer the affidavits, the respondent does not object to time being given for that purpose. That is all that the petitioner can ask; affidavits are not rejected in ordinary cases because filed at the last moment. If this is not done as between ordinary litigants in private cases, much less should it be here, where there is a higher interest at stake. The public is concerned in preventing

the grant of an invalid patent. It is submitted, therefore, that the Court will at once hear the matter, unless the other side asks that it may stand over to answer the affidavits, or that it may be referred back for the consideration of the law officer of the Crown.

Mr. Hindmarch, in reply. — Two months have elapsed since notice of the petition was served, and the only reason given for the delay in filing the affidavits in opposition is, that the respondent's witnesses have been travelling from place to place in Scotland, and that in consequence their evidence could not be forthcoming sooner.

THE LORD CHANCELLOR. — Under the circumstances of this case, I shall make the order for the great seal to be affixed to this patent. All the petitioner's proceedings have been regular, and he is entitled to have the great seal affixed, unless a case is shown for delay. No objection was made * before the officer of the * 4 Crown, before whom the matter was, though all the regular notices had been given. Still there was left the course of opposing on affidavit before the Lord Chancellor the application to have the great seal affixed to the letters-patent. But in pursuing that course diligence must be used. Now on this the first day of term, the party opposing comes into Court with affidavits not filed till the morning appointed for the hearing of the petition. Under these circumstances, he has been guilty of such negligence as to deprive him of his right to be heard. I therefore shall make the order sought by the petition.

Mr. Hindmarch asked for costs.

The Lord Chancellor held that it was not a case for costs.

THIEDEMANN v. GOLDSCHMIDT and Others.

1859. November 8. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Bills of exchange in the hands of foreign indorsees for value were accepted in England on the faith of the genuineness of a bill of lading, which was presented to the acceptor with the bills of exchange by the indorsees, but which afterwards proved to have been forged by the drawer. The indorsees were unaffected with notice of the forgery when they obtained the acceptance. In a suit by the acceptor against the indorsees for delivery up of the bills, and an injunction against negotiating or proceeding at law upon them: *Held*, that, on the defendants undertaking to deliver up the bills in the event of the judgment at law being against them, no injunction ought to be granted.¹

THIS was an appeal from the decision of Vice-Chancellor STUART upon a motion for a decree, reported in the first volume of Mr. Giffard's Reports, (a) whereby his Honor directed the delivery up of certain bills of exchange, and made perpetual an injunction which had been granted, restraining the defendants from negotiating or taking any proceedings upon the bills.

* 5. * The plaintiff, a corn factor, carrying on business at Newcastle-on-Tyne, by letter dated the 12th of June, 1858, authorized O. F. Homeyer, his correspondent at Wolgast, in Prussia, to draw upon him at the Union Bank of London against a transmittal of a bill of lading of a cargo of wheat to be shipped to the plaintiff at Newcastle.

O. F. Homeyer accordingly, on the 26th of June, 1858, drew upon the plaintiff for 2400*l.*, in six bills of exchange of 400*l.* each, in firsts and seconds, payable to his own order at two months' date. Having indorsed the bills in blank, he enclosed them in a letter to a company at Berlin, called the Berlin Discount Company, then acting as his bankers, together with a document purporting to be a bill of lading of 8320 scheffels (about 1500 quarters) of wheat shipped to plaintiff at Newcastle.

The letter, which was dated 26th of June, was as follows:—

(a) Page 142.

¹ See Kerr Inj. 15, 33; 2 Dan. Ch. Pr. (4th Am. ed.) 1651; *Leather v. Simpson*, L. R. 11 Eq. 398, 405, 407.

"To-day I hand you 2400*l.*, in six bills for 400*l.* each, on the Union Bank of London, two months' date, firsts and seconds, requesting you to send the firsts for acceptance, and to negotiate the seconds at the most favourable exchange. At the same time, I request you will cause the enclosed bill of lading to be given up upon the acceptance in London. I further beg you will send by the first mail for my account to Messrs. Ziemsen & Wibelitz, in Stettin, thalers 4800, and to me thalers 6000 bank-notes, likewise by return of post."

Upon receipt of this letter, the company forthwith * sent * 6 the firsts of exchange for acceptance, together with the document purporting to be a bill of lading, to Messrs. Goldschmidt & Bischoffsheim, their agents in London; and they, on the same day, made the remittances to or on account of Homeyer, as requested in the letter.

In the account of this transaction sent by the company to Homeyer, on the 1st of July, 1858, they deducted from the amount of the bills of exchange certain charges for brokerage and expenses of acceptance, and stated that they had credited his account with the balance. These remittances to or on account of Homeyer, and a further advance to him of 3000 thalers, the whole amounting to 2120*l.* or thereabouts, were, as the company stated by their answer, made entirely on the faith that the bills of exchange would be duly accepted and paid.

On the 30th June, 1858, Messrs. Goldschmidt & Bischoffsheim on behalf of their correspondents, the Berlin Discount Company, presented to the Union Bank of London for acceptance, on account of the plaintiff, the six bills of exchange which had been sent to them by the company, and at the same time presented to and left with the Union Bank the paper purporting to be a bill of lading which had accompanied the bills of exchange.

On the following day, the Union Bank of London, believing the paper to be a genuine bill of lading, pursuant to instructions previously received from the plaintiff, accepted on his account the six bills of exchange.

On the 12th July, 1858, the plaintiff first discovered * that * 7 the paper writing purporting to be a bill of lading had been forged by Homeyer, and that no wheat whatever had been shipped by him to the plaintiff.

Messrs. Goldschmidt & Bischoffsheim, by their answer, denied that they had made any representation as to the genuineness of the bill of lading on presenting the firsts of exchange for acceptance, and it was admitted that neither they nor their principals had at that time notice of the forgery.

The firsts of exchange presented for acceptance, were not indorsed by the Berlin Discount Company, but the company afterwards indorsed the seconds, three of which they negotiated on the 3d July, at Berlin.

The bill sought the delivery up of the bills of exchange to be cancelled, on the ground that the plaintiff's acceptance thereof had been obtained by fraud; and an injunction to restrain the negotiation of the bills, or the prosecution of any action thereon, by the Messrs. Goldschmidt & Bischoffsheim, or the Berlin Discount Company.

Mr. Bacon and *Mr. Hetherington*, for the plaintiff, in support of the Vice-Chancellor's decree. — In *Robinson v. Reynolds*, (a) relied upon by the defendants before the Vice-Chancellor, the question turned upon the form of the pleadings, and the decision is not of general application in all cases. That case differs from the present in one material respect. It was a case on a discount.

There the bill of exchange was, with the forged bill of lading, * 8 handed over the counter at the * bank, the money being received in exchange. The bank thus became a holder for value and indorsed both the bill of exchange and the bill of lading. That was a discounting transaction. Not so the present. The Berlin Discount Company received the bills with a direction to send the firsts to London for acceptance with the pretended bill of lading, and to negotiate the seconds. At the same time Homeyer, who had long been their customer, drew upon them for various sums of money, without reference either to the negotiation or discounting of the bills of exchange. The bank, pursuant to the direction, sent the firsts of exchange and bill of lading (both unindorsed by them) to London, but kept the seconds in their own possession. This transaction was not by way of discount. The bank advanced the sums upon Homeyer's drafts, not upon the credit of the bills of exchange, but upon Homeyer's credit as their customer. That this was so, is shown by the charge subsequently made for brokerage by the bank, as if they had obeyed Homeyer's instructions, and com-

(a) 2 Q. B. 196.

missioned a broker to discount the bills. Under these circumstances the bank were not, it is submitted, holders for value of the bills, but merely agents of Homeyer, and their possession of the bills can give them no rights other than those of Homeyer.

The acceptance of the bills was obtained by means of a fraud practised upon the plaintiff and the Union Bank. The bills are shown to have been accepted on the faith that the document handed by the defendants Goldschmidt & Bischoffsheim to the acceptor at the time of, and as the consideration for, the acceptance was a valid document: a faith which resulted from the representation implied, though not expressly made by the defendants, on presentment of the bills of exchange for acceptance and delivery of the bill of lading. The defendants must have known that Homeyer had no authority * to draw the bills, except against the produce of * 9 the bill of lading, and that the plaintiff's acceptance was to be conditional upon his receiving a good bill of lading. The whole consideration, therefore, fails as between the defendants and the acceptor. The defendants were the channel through which a fraud had been committed upon the plaintiff; and though they themselves were innocent of any participation in such fraud, the plaintiff is justified in refusing payment of the bills.

They referred to *Lickbarrow v. Mason*, (a) *Jones v. Ryde*. (b)

Mr. Malins and *Mr. Ferrers*, for the defendants, in support of the appeal. — In a case circumstanced as the present, there is no defence in equity which is not equally available at law. A Court of Law has complete jurisdiction, and the bill ought to be dismissed. It is immaterial as regards the defendants, the Berlin Discount Company, whether this case is identical in its circumstances with *Robinson v. Reynolds*, or not. The question is, Are they holders for value of the bills in question or not? If they are the mere agents of Homeyer, the plaintiff has a good defence upon the bills at law, and does not require the assistance of a Court of Equity. If, on the other hand, the defendants, the Berlin Discount Company, are holders for value, they are entitled to recover upon the bills at law, and ought not to be interfered with by injunction. Interference under such circumstances between the parties to a bill of exchange is foreign to the province of this Court. If it is right

(a) 2 T. R. 63.

(b) 5 Taunt. 488.

to interfere in this case, any acceptor of an accommodation
 * 10 bill might apply * to this Court for an injunction, though he
 had a valid defence at law. This bill is, in truth, demurrable.

[THE LORD JUSTICE KNIGHT BRUCE. — The bill prays the delivery up of the bills. Will the appellants undertake to deliver up the bills if the decision at law should be against them ?]

They are willing so to do if the Court should require such an undertaking. But we submit that a Court of Law can give complete relief, and that the plaintiff, if successful at law under such circumstances, could not be put to file a bill for the delivery up of the bills. Irrespective of the merits, therefore, the bill should be dismissed with costs. Upon the question of merits the case is, it is submitted, on all-fours with that of *Robinson v. Reynolds*, (a) and must be governed by the same rule.

Mr. Bacon in reply. — This Court has undoubtedly jurisdiction (not possessed by a Court of Common Law) to order the delivery up of these bills, and there is no reason why, in such a case, it should not also have jurisdiction to grant an injunction.

THE LORD CHANCELLOR. — I am of opinion that this injunction should not have been granted. I think that dangerous consequences would follow, and the credit of bills of exchange be very much shaken, if the title of the indorsees of bills of exchange as against the acceptor under such circumstances could be called
 * 11 in question. It is allowed that the case of * *Robinson v. Reynolds* was well decided, that its authority has never been questioned, and that it is part of the commercial law of England. Now, the indorsee in that case was a holder *bonâ fide* for value, and on that account the circumstances which existed there as between the acceptor and the drawer were not permitted to shake the title of the indorsee. The bills had been accepted by the drawee on the credit of the drawer; and had been, in an independent transaction, indorsed to the plaintiff, so that, as between the plaintiff and the acceptor, there was full value and an unimpeachable title. I apprehend that is precisely the case here. The banking company were indorsees *bonâ fide* for value — whether it

(a) 2 Q. B. 196.

was upon a discount or whether it was an advance of the value in any other way seems to me wholly immaterial. They advanced money to within a trifle of the amount of the bills of exchange, and, having advanced that money, they were indorsees for value. That being so, it must be considered that the bills were accepted by Thiedemann on the credit of Homeyer, and for that reason it would be alarming if the title of the indorsees (they holding the bills *bond fide* for value) could be thus impeached.

If it had been shown that the banking company were not *bond fide* holders of the bills, an action by them against the acceptor might have been defended. But I do not find that the banking company did any thing that was not entirely sanctioned by commercial usage. They have advanced money on the faith of these bills, and they had a right to tender them for acceptance. Having obtained the acceptance, they have an undoubted right to apply the bills for their own indemnity.

* THE LORD JUSTICE KNIGHT BRUCE. — The appellants are * 12 holders of the bills in question for value. Neither their honesty nor the propriety of their conduct is impeached. Therefore, whatever may be the probability of success or failure at law on either side, there is, I think, no equity here, unless a case can be made out for the delivery up of the bills. This is not a demurrer. I think, therefore, that the only difficulty in the case, if there be any, will be surmounted by the undertaking which the appellants' counsel have consented to give, and which will, I suppose, be embodied in our order, — that in the event of judgment being obtained at law against the appellants, the bills shall be delivered up to the plaintiff, who, in that event would, I presume, be the person entitled to them. That being done, I think the bill should be dismissed with costs, but I do not think that there should be any costs of the appeal.

The Lord Justice TURNER concurred.

WILLS v. GANDY.

1859. November 10. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The rule, that when two suits are instituted for the administration of the same estate that shall be prosecuted in which the earlier decree has been obtained, does not apply where it has not been obtained fairly; and the Court held this to have been the case where, on the same day of which notice had been given to an executor to appear to an administration summons, he appeared of his own accord at an earlier hour in the Chambers of another Judge, and consented to a decree on a summons then and not previously applied for by another plaintiff.¹

THIS was a motion on behalf of an executor who was defendant to two suits instituted by different creditors of a testator, — one in Vice-Chancellor STUART's Court, and the other at the Rolls. The ordinary administration decree having been made in the Chambers of the Vice-Chancellor, the object of the motion was to have transferred to the Court of that Judge the other suit which was commenced also by summons, and in which a decree had been made later on the same day. There was a cross-motion on behalf of the plaintiff in the Rolls' cause to have the Vice-Chancellor's cause transferred to the Rolls.

It appeared by the affidavits, that on the 21st of September, Harris, the plaintiff in the Rolls' suit, served the executor with an administration summons, returnable at the Chambers of the Master of the Rolls at half-past eleven o'clock on the 29th of October. That, at eleven o'clock on that day, the plaintiff in the Vice-Chancellor's cause for the first time applied at the Vice-Chancellor's Chambers for a summons for the administration of the same estate, and that the executor, who was present by arrangement, had admitted the debt, whereupon the common administration decree was at once taken.

Notice of this decree was given to the solicitor of the plaintiff in

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 799; Frost v. Wood, 12 W. R. 285; S. C. *nom.* Frost v. Ward, 2 De G., J. & S. 70; Littlewood v. Collins, 1 N. R. 457; Rhodes v. Barret, L. R. 12 Eq. 479.

the Rolls' cause before the administration summons in that cause was called on, but the plaintiff at the Rolls nevertheless went in before the chief clerk and obtained a decree for the administration of the estate, * with the addition of an order permit- * 14
ting the payment into Court of a sum of money secured by a policy of insurance upon the life of the testator on the executor delivering up the policy to the party making such payment.

Mr. E. F. Smith, for the executor, in support of the motion to transfer the Rolls' cause to the Court of the Vice-Chancellor. — As soon as the solicitor of the plaintiff in *Harris v. Gandy* had notice of the existence of the decree in *Wills v. Gandy*, it became his duty to stop all the proceedings in his own suit. The first decree is the only one that can be prosecuted. If it was obtained improperly by one creditor in fraud of another, or if it was objectionable on any other ground, the proper course was to apply to the Judge by whom it was pronounced, who had power to give all proper directions as to the conduct of the suit. This has been the course from the earliest times in all cases, and in whatever way the first decree had been obtained.

The practice of racing for a decree was recognized by Lord ELDON in *Jackson v. Leaf*, (a) where he says: "if one creditor files a bill in this Court, and afterwards another files a bill, and the executor answers the second directly, and a decree is obtained, then it is competent for the executor himself to restrain the first from proceeding." The present motion is in accordance with the practice laid down by the Master of the Rolls in *Swale v. Swale*, (b) and adopted by the Lords Justices of appeal in *Duffort v. Arrow-smith*. (c)

* *Mr. Daniel*, for the plaintiff in the Rolls' suit, in support * 15
of the cross motion. — Admitting the general practice to have been as stated, it has never been held to apply where the first decree has, as in the present case, been obtained by collusion with the executor, and for the express purpose of defeating an application for a decree in another suit, with notice of which the executor had been served. The fact that the executor was present at the Chambers of the Vice-Chancellor STUART when the summons in the second suit was applied for, and there admitted the debt, is

(a) 1 J. & W. 229. (b) 22 Beav. 401. (c) 7 De G., M. & G. 434.

of itself proof of collusion. Moreover, the decree which has been obtained at the Rolls is more extensive than that in *Wills v. Gandy*.

Mr. C. Hall, for the plaintiff in the Vice-Chancellor's cause. — There is no evidence of collusion between the executor and the plaintiff in the cause before the Vice-Chancellor. If, however, there had been, there is nothing wrong in the executor giving facility to any one creditor he pleases.

Mr. E. F. Smith, in reply. — The fact that the chief clerk of the Master of the Rolls has added to the common administration decree a simple permission to a stranger to pay in a sum of money on the executor handing to him a policy of insurance, cannot affect the question of the right to have both suits prosecuted in the Court in which the first decree was obtained. The two decrees are not inconsistent with each other, and the same relief may be obtained under the first as is expressly given by the second.

THE LORD CHANCELLOR. — In my opinion, this estate should
* 16 be administered in * the Court of the Master of the Rolls.

The rule is, I agree, that where there are two suits for the administration of the same estate, the estate should be administered in that Court in which a decree is first obtained. But it is a rule which, as it seems to me, does not apply, nor was ever intended to apply, where the first decree has not been fairly obtained; and I must say that I do not think that it was a fair proceeding on the part of the plaintiff in *Wills v. Gandy* to take, or of the executor to consent to, a decree, when it was known to them both that a decree was to be applied for on the same day under the summons pending in the other suit.

THE LORD JUSTICE KNIGHT BRUCE. — I greatly regret there should have been occasion for a discussion in such a matter as this. In the present state of the practice it is of the slightest or no importance in which Court the estate is administered, or to which of the two Judges both causes go. If we are to exercise a discretion, there is abundant reason for preferring the Rolls' Court for the present purpose.

The Lord Justice TURNER concurred.

* In the Matter of The LONDON AND EASTERN * 17
BANKING CORPORATION,
and
In the Matter of The JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 and 1849.

LONGWORTH'S EXECUTORS' CASE.

1859. November 9, 10. Before the Lord Chancellor Lord CAMPBELL and the
LORDS JUSTICES.

A banking company, established by charter, under the 7 & 8 Vict. c. 113, which prohibits such companies from commencing business until half their capital is paid up, carried on business in contravention of the prohibition, and was afterwards wound up under the Winding-up Acts. *Held*, that a call might be properly made in respect of the liabilities incurred in the course of such illegal dealing.¹

THIS was an appeal of contributories from the decision of Vice-Chancellor WOOD, refusing to discharge an order for a call made in the course of winding up the above company.

The company was incorporated by royal charter dated January 20, 1855, under the provisions of 7 & 8 Vict. c. 113, the 5th section of which provides, "That it shall not be lawful for any such company to commence business until all the shares shall have been subscribed for, and until the deed of partnership shall have been executed personally, or by some person duly authorized by warrant of attorney to execute the same on behalf of such holder or holders, by the holders of all the shares in the said business, and until a sum of not less than one-half of the amount of each share shall have been paid up in respect of each such share, and it shall not be lawful for the company to repay any part of the sum so paid up without leave of the lords of the said committee."

The charter proceeded on the footing of a deed of incorporation recited in it and dated the 1st of September, 1854. This deed contained the following clauses:—

¹ See *Campbell v. Campbell*, 7 Cl. & Fin. (Am. ed.) 166, note, 188, note; *Angell & Ames Corp.* (9th ed.) §§ 186, 531, and notes.

7. The capital of the company shall consist of or be taken to amount to the sum of 500,000*l.*, and shall be divided into
 * 18 5000 shares of 100*l.* each, with power to * increase the said capital and number of shares as after-mentioned.

90. From and at all times after the company shall have commenced business the directors shall cause a correct balance sheet and statement of the assets and liabilities of the company, made up to the last day of the then preceding month, to be published in the London Gazette, once at least in every month.

99. The directors shall cause full and true accounts to be kept of all sums of money received or expended on account of the company by the directors, and all persons employed by or under them, and of all the matters and things for which such sums of money shall have been received or disbursed and paid, and one uniform system of making out and keeping such accounts shall be adopted and practised at all the places where the business of the company or any part thereof shall be carried on.

100. No shareholder not being a director nor any mortgage or bond creditor shall have the right to interfere with the affairs or concerns of the company, or to inspect any books of accounts or minutes containing the banking transactions of the company with its customers, nor shall the directors be at any time compelled to disclose to the general meetings or otherwise any thing beyond the general results of business of the company, or to show the name of any of its customers, or the state of any particular account. But each of the present trustees of the company, and any future trustee who shall be specifically authorized by resolutions of a general meeting for that purpose, shall have the
 * 19 same right of inspecting the books, minutes, documents, * and writings of the company as the directors for the time being.

101. The books relating to the general affairs of the company shall be balanced thirty days at least before such ordinary general meeting, and forthwith, on the books being so balanced, an exact report and balance sheet shall be made up, which shall exhibit a true statement of the capital, stock, credits, and property of every description belonging to the company, and the debts due by the company at the date of making such balance sheet, and a distinct view of the profit or loss which shall have arisen on the transactions of the company in the course of the preceding year and previously to each ordinary general meeting; such report and

balance sheet shall be examined by the directors or any three of their number, and shall be signed by the directors, and shall thereupon be recorded in the books of the company.

103. The directors shall cause these presents and such of the said books of accounts and all such minutes and other books, documents, and writings belonging to the company as relate to the general affairs of the company, and also the reports and statements which are hereby required to be produced by the directors to the general meetings, to be kept at the principal office of the company.

105. The said books relating to the general affairs of the company so balanced as aforesaid, together with such balance sheet as aforesaid, shall, fourteen days previous to such ordinary general meeting and for one month thereafter, be open for the inspection of the shareholders at the place of business of the company wherein such meeting is to be held ; but the shareholders shall not be entitled * at any time except during the period * 20 aforesaid to demand the inspection of such books unless in virtue of a written order signed by two of the directors.

106. The directors shall produce to the shareholders assembled at such ordinary general meeting the balance sheet applicable to the period immediately preceding such meeting, together with the report of the auditors thereon as hereinbefore provided, and a copy of such balance sheet, with the profit and loss account and of the auditor's report, shall be transmitted gratis to every shareholder.

On the 24th of January, 1855, a meeting of the directors was held, of which the following minutes appeared in the company's books : —

“ Present: Erskine, in the chair ; Chadwick, Lattey, Griffith, and Stephens.

“ Balance sheet laid before board taken from general ledger closed 20th of January, 1855.

“ The charter incorporating the company having been granted on the 20th instant, and its provisions requiring that every share before commencing business should be signed for, and that half the amount should be paid, while powers of attorney to sign the deed from absent shareholders in India and elsewhere cannot be received in London within the time required, it was

“ ‘ Resolved unanimously, that in order to effect the great object of immediately commencing business, and avoiding the

possible forfeiture of the charter for want of fulfilling the requirements thereof, the shares this day remaining unsigned for,

* 21 should, as a temporary measure, * be taken by the directors in their individual names, and be hereafter transferred at par by them as soon as possible into the names of other parties.'

"It was further resolved, that, to enable the directors to pay up at once the necessary amount on each share as required by the charter, the board should take from them cash credit bonds for the amount of their shares so signed for, such cash credit bonds to bear no interest, and the shares, so taken up and signed for, to carry no dividend.

"In accordance with the above resolutions the directors among them completed the share list to the required number, viz. 5000 shares, all subscribed for, half fully paid up."

[Here followed the number of shares taken by each of the directors, making a total of 1028 shares signed for under the above minute.]

"It was further resolved, that these shares should be allotted and transferred hereafter into the names of other parties, as nearly as possible in equal proportions from each cash credit; and, further, it is agreed by the unanimous assent of the board, that the amount of these cash credits shall not be called up from the parties signing the same without his own expressed assent thereto."

The whole of the 250,000*l.* was never in fact paid up in cash, but the company nevertheless carried on business as bankers.

On the 11th of March, 1857, the company stopped payment, and on the 25th of November, 1857, an order was made for winding it up.

* 22 * Under this order the appellants were placed on the list of contributories as executors of Major Longworth, a deceased shareholder, and an order for a call was subsequently made on all the contributories upon the footing of a report of the official manager, setting forth the amount which would be required in order to pay the debts proved under the winding-up order and the costs. Some of these debts were in respect of ordinary banking transactions, and application was made in the Chambers of Vice-Chancellor Wood on behalf of the appellants, that the order for

a call might be discharged as being made partly in respect of banking transactions entered into illegally before half the capital had been subscribed.

The application was adjourned into Court, and the Vice-Chancellor refused to disturb the call. The case is reported in Mr. Johnson's Reports. (a)

Mr. Daniel, Mr. Giffard, and Mr. De Gez, in support of the appeal.—This call is in fact an enforcement by the order of a Court of justice of contribution among wrong-doers in respect of illegal transactions. Such a call is a violation of the rule "*ex dolo malo non oritur actio*." The Vice-Chancellor considered that the contravention of the statute was the act of the directors, and that the shareholders were not *in pari delicto*, but the resolution to contravene the statute appears upon the minutes which are accessible to all the partners, and which they all must be taken in point of law equally to know.

[THE LORD CHANCELLOR.—Is it quite clear that the minutes are accessible to all the shareholders?]

By the deed of settlement the * shareholders are restricted * 23 from inspecting the customers' accounts, but the other books are open to their inspection. Therefore the shareholders had access to the minute-books of the directors, and had all the means of knowing that this arrangement had been made; and if they had the means of knowing they are liable to have knowledge imputed to them. The transactions in respect of which the call is made were therefore dealings which the parties interested in the company thought proper to permit their directors to commence and carry on without having complied with the provisions of the Act. The consequence of this state of things was under the consideration of the Court of Bankruptcy in a recent case, and that Court decided that as against the estate of Colonel Waugh, one of the directors (who is a debtor to the bank to a large amount on his drawing account), the official manager of the company could not be admitted to prove on the ground of illegal trading. There is no doubt as to the law being as laid down by Lord ELLENBOROUGH in *Langton v. Hughes*, (b)

(a) Page 465.

(b) 1 M. & Sel. 596.

that whatever is contrary to an Act of Parliament is illegal, and that out of transactions which are illegal no right of action can arise. In *Mitchell v. Cockburn*, (a) (which was decided when, in favour of a legislative monopoly of two insurance companies, partnerships in underwriting were made illegal), two persons had been engaged in insurance transactions: they both became bankrupts, and, one having paid the whole of the debts, the question was, whether there could be contribution from the estate of the other. The transaction being illegal, it was held that there could be no contribution. The Vice-Chancellor considered in the present case that a distinction must be taken between companies * 24 which * are formed for an illegal object, and companies which are formed for a legal object — which are legal in their inception, but which have entered into illegal transactions. We submit, however, that for the purpose of the present argument there is no distinction between the cases.

[THE LORD CHANCELLOR.—In *Mitchell v. Cockburn* the contract was illegal. This is a case of legal contracts as between the customers and the bank. The insurances in *Mitchell v. Cockburn* were void. Were not the debts here valid?]

Mitchell v. Cockburn was not decided on the ground that the insured had no remedy. Under the Act prohibiting partnerships in insurance, where there was a single underwriter with whom an insurance had been effected, and the insured did not know of any partnership, he could recover, because the underwriter could not defend himself by setting up an illegal contract entered into by him, of which the insured was ignorant. But still no contribution could be enforced, because, although the debt was valid, the provision that the partners should participate in the benefits or losses of it, was an illegal stipulation. In *Ewing v. Osbaldiston*, (b) Mr. Ewing engaged to carry on the Surrey Theatre in partnership with Mr. Osbaldiston. Mr. Osbaldiston received Mr. Ewing's money, and refused to pay what was due from him. On Mr. Ewing filing a bill, Mr. Osbaldiston most iniquitously, as must be admitted, said: "This transaction in which we have been engaged in was illegal, because at the Surrey Theatre entertainments consisting of music

(a) 2 H. Bl. 379.

(b) 2 Myl. & Cr. 53.

and dancing were alone lawful. Plays have been acted there, and they are illegal, and therefore you shall not have your money." Lord COTTENHAM held that a sufficient defence, although Mr. Ewing had taken no part in the violation of the law, and Mr. Osbaldiston had. The Vice-Chancellor thought * *Ewing v. Osbaldiston* distinguishable from the present case on the ground that Mr. Ewing knew, as appeared by the correspondence, that theatrical representations had been given at the Surrey Theatre. We submit, however, that although that circumstance existed there the decision did not turn upon it. If the circumstances had been these, that up to the time when the contract was entered into, music and dancing had been the only entertainments given at the Surrey Theatre, and Mr. Ewing had gone back to Scotland and had not troubled himself to see whether this state of things continued, or what entertainments were given, and then he had called upon Mr. Osbaldiston to account for profits or losses arising from the representation of plays, could not Mr. Osbaldiston equally have said, "You seek contribution in respect of illegal dealings?" Would it not have been in vain for Mr. Ewing to say, "I did not know when I entered into partnership with you, that you meant to give illegal entertainments, I thought you were carrying on the concern legally. I must therefore have an account of profit and loss of the illegal transactions, because I entered into partnership with you for a legal purpose?" A similar case may be supposed of a steamboat company trading with the coast of Africa, which, though formed for legal purposes, had engaged in the slave trade. Could the gains and losses arising from such traffic have been the subjects of an account in a Court of justice, or would it make any difference that one of the partners might not have known that illegal transactions had been entered into? We submit that although a company may be formed for legal purposes, still, if it engage in illegal transactions, there can no more be contribution in respect of those illegal transactions than there could, if they alone had been the objects of the company.

[THE LORD CHANCELLOR. — Suppose this section of the Act had gone on to say that the company should not enter * into * 26 any transaction before ten o'clock in the morning or after ten o'clock at night, would a contract entered into before or after those hours by the directors, without the personal knowledge of the

shareholders, prevent a shareholder upon whom a debt had been levied from having a remedy against the other shareholders?]

In such a case any person who contracted before or after those hours would have entered into an illegal contract, and could enforce no claim against the company. But although a customer, ignorant of any illegal dealing, might recover against the bank, because the bank could not set up its own illegality, it is beyond all question that the bank could not recover from a customer who overdrew. That was decided by the case of *Hall v. Franklin*. (a) In that case there happened to be one shareholder in a banking company, who was a clergyman, and it was held that the company could not recover against the acceptor of a bill which the company had discounted.

[THE LORD CHANCELLOR. — Is it your argument that a customer might levy for his whole debt upon any one shareholder who was *de facto* wholly ignorant of the illegality of the transactions, and that still he would have no remedy for contribution against any other shareholder ?]

Let the case be first considered as between two directors, who certainly would be *in pari delicto*,—two directors who had joined in passing those resolutions. Upon what principle could it be contended one of those two directors could recover from the other ?

[THE LORD CHANCELLOR. — Would all the shareholders be liable to an indictment because the directors began to trade before half the capital was paid up ?]

It is not necessary to carry the argument to that length ; but even if the shareholders were indicted, there would be evidence to go to a jury.

[THE LORD CHANCELLOR. — If I were trying such a case I
* 27 should direct the *jury to acquit, unless the dealing was brought to the personal knowledge of the shareholders.]

You must impute to copartners a knowledge of that which is in their partnership books.

(a) 3 M. & W. 259.

[THE LORD CHANCELLOR. — Partners are supposed to be aware of all transactions of the firm, but Courts of Law and Equity have made a distinction between a common partnership and a joint-stock company.]

In both cases the question is one of circumstances. The question is, whether the facts here are not enough to bring the shareholders within the rule, that an ordinary partner is supposed to know the contents of the partnership books. In an ordinary partnership it is not enough to say that one of the firm was a sleeping partner, and that he never went to the place of business. If there had been three people in this partnership instead of three hundred, knowledge would be imputed as a matter of course. So here at the public meetings, and in the communications between the shareholders and their agents, and the trustees and their auditors, it must have come to the knowledge of any shareholder who made an investigation, that the dealings were illegal.

[THE LORD JUSTICE TURNER. — What do you say that a shareholder ought to have done, supposing him to have discovered the fact that this resolution was passed, on which you rely ?]

He might have filed a bill for an injunction to prohibit an illegal course of dealing from taking place. If a person engaged in partnership sees that his partners are on the eve of entering into a transaction which is not legal, it is his duty to prevent their so doing, and, if he cannot do so in any other way, to file a bill. If the circumstances are such that you can impute to the shareholders at large a knowledge of the illegal dealings, as you could impute it to the members of a small partnership, the consequence will be the same. The public are entitled, when they deal with joint-stock companies of this description, to have that protection which the Act of * Parliament provides for them, namely, that there * 28 shall be half of the capital paid up, and that they shall not deal with a mere bubble company. It is the duty of every subscriber to the undertaking to take care that the Act of Parliament has been complied with.

[THE LORD JUSTICE TURNER. — Supposing that a shareholder had protested against the business going on, would you say that he was

in pari delicto with those who carried on the business, because he did not file a bill for an injunction to restrain them from doing so ?]

No such protest is suggested to have been made here, and it is therefore not necessary to maintain that proposition. Where there is a joint-stock bank, which has traded for a long time, and its books have been exhibited, or produced at public meetings, and there are trustees and auditors, whose duty it is to look at the books and inform the shareholders of their contents, and the deed of settlement positively provides that for one month after the meeting of shareholders there shall be an opportunity afforded of inspecting the books, the Court must, in the absence of evidence to the contrary, impute to the shareholders knowledge of the company's dealings, and, if that be so, they stand for all practical purposes *in pari delicto* with the directors.

[THE LORD CHANCELLOR. — Are the whole body of shareholders supposed to know all that the directors do ?]

There is a high authority for imputing knowledge to them. In *Nicoll's Case*, (a) Lord Justice TURNER says: "There were, however, auditors of this company, appointed by the shareholders. These auditors were, within the scope of their duty, at least as much the agents of the shareholders as the directors were, and the false and fraudulent representations were discoverable by them. It * 29 cannot, therefore, I think, be said that the respondent * was without the means of knowledge, and I think that in a case of this description the respondent, if he had the means of knowledge, can be in no better position than he would have been if he had actual knowledge."

[THE LORD CHANCELLOR. — Would you say that, in point of fact, it was to be expected that all the shareholders should examine the books, so as to see by addition that 250,000*l.* had been subscribed ? If the amount fell short by a single shilling, that would be equally contrary to the Act of Parliament.]

(a) 3 De G. & J. 441.

We need not carry the argument so far, for the illegality appeared upon the resolutions of the directors, which actually set the company in motion. The shareholders did not require to look at the accounts to have notice of the transaction, the only thing requisite would have been to look at the resolutions of the directors ; and here was a resolution saying in so many words that the capital had not been paid up, and that in order to make a fictitious capital, the directors would put down in the book of names persons who were never intended to pay.

Mr. Rolt, Mr. Bovill, and Mr. Roxburgh for the official manager, were not called upon.

November 10.

THE LORD CHANCELLOR.—We have considered this case since the Court adjourned yesterday, and I confess that the strong opinion which I then entertained is strengthened upon reflection. I have now no doubt whatever that the order below should be affirmed.

The ground upon which it is said that the order ought to be set aside is, that there was some illegality to be imputed to those for whose benefit the order is to be made. Now the order is to be made for the benefit of the shareholders * who are * 30 liable to the creditors of the company, and we are to say whether there is any *delictum* imputable to them, which should deprive them of the remedy for which they now apply, namely, an order for this call.

In one sense these transactions were illegal, that is to say, they ought not to have been entered into. But “*fieri non debuit factum valet.*” It was wrong to begin the transactions of the company until half the capital had been paid up, but it was a company for a legal purpose, and the transactions out of which the necessity for this call arises, were legal, that is to say, the customers have a remedy for the deposits which they made, and the creditors of the company cannot at all be affected by the irregularity of which the directors were guilty. This was not a company established for an illegal purpose, nor were the dealings void out of which this demand arises, because the creditors of the company had a right to sue the company, and having sued the company and got a judgment they would have had a right to take any effects of the company that could be found ; and they had a right if the company

had no effects to come upon any shareholder for the whole sum recovered from the bank. Therefore the company was not illegal, and the transactions out of which this arises having been entered into were not illegal. The creditors had a right to maintain an action. That is now allowed, although I find that in the Court below it was first contended that every thing was illegal, and I think that *Mr. Daniel* did well in so contending, because if he could have proved this, it would have gone to the root of the whole, but having been obliged candidly to give that up, as I find he did in the course of the argument in the Court below, I think that the ground was cut from underneath him, and when it was found that as between the customers and the company the dealings

* 31 * were not void, the consequence inevitably follows that there might be a call for contribution.

Now what is the *delictum*? Can the shareholders be supposed, although they might have had the means of knowledge, to have gone to the books of the company and to have summed up all the items of money paid towards the capital, to ascertain that the amount in the first instance was 100,000*l.* and then 250,000*l.*, and to take care that it was not short by a single shilling, because upon the reasoning to which *Mr. Daniel* was obliged to resort if it had been wanting in a single shilling his argument would have been equally valid. I think, there was no illegality, no *delictum* here, to be imputed to the shareholders. Could they have been indicted for what was done by the directors? Most certainly not. The directors, I believe, in strict law could have been indicted, because to violate an Act of Parliament, although there is no specific penalty annexed to that violation, is a misdemeanour, and a person who does so is liable to be indicted and punished; but can it be said that the shareholders because they did not see that this sum had been paid up, and because they did not file a bill for an injunction, had committed a misdemeanour, and were liable to be indicted and imprisoned?

It seems to me, therefore, that there was no *delictum* which can be imputed to them, and that this case does not at all come within the general maxim that out of illegality no action can arise.

Upon the whole I entirely agree with the view that was taken of this case by the learned Vice-Chancellor, and I think that this appeal ought to be dismissed with costs.

* THE LORD JUSTICE KNIGHT BRUCE.—There is so much of * 32 good sense and abstract justice in the Vice-Chancellor's decision that it would be indeed a matter for regret if by the strict rules of law we were obliged to dissent from it. I think that we are not so obliged, and that the principle of law to which allusion has been so much and so properly made during the argument, and the just exposition of the statute of the 7 & 8 of the Queen, require no such thing. We are dealing here with the general interests and rights of the shareholders. The special liabilities of the directors and the special position in which the directors may have placed themselves are not matters with which for the present purpose we have any concern. I agree that the appeal should be dismissed with costs.

THE LORD JUSTICE TURNER.—I had an opportunity of looking into this case last night, and I am quite satisfied that the order made by the Vice-Chancellor is correct. I think it is quite a different question what knowledge is to be imputed to the shareholders as between them and third persons dealing with the company, and what knowledge is to be imputed to the shareholders as between them and their directors or trustees. There is a case of *Hale v. Hale*, (a) in which the cases are referred to, which is not without its bearing upon this point. I think, upon the whole, that the order of the Court below should be affirmed, and that this appeal should be dismissed with costs.

* PIGGOTT v. STRATTON.

* 33

1859. November 8, 4, 12. Before the Lord Chancellor Lord CAMPBELL, and the LORDS JUSTICES.

The defendant held two plots of building land, B & C, under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B a sea view over plot C. H. having entered into a treaty with the defendant for an underlease of B, made inquiries of the defendant as to what could be built on the land in front. The

(a) 4 Beav. 369. See also *Campbell v. Campbell*, 7 Cl. & Fin. 166; and see *Lindley on Partnership*, 647, and the cases there collected.

defendant replied that he the defendant could not build on C closer than thirty feet, as his lease did not allow it. H. after having inspected the original lease took an underlease of B, containing a covenant by the defendant that he, his executors, administrators, and assigns, would observe the lessee's covenants in the original lease. The defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on C in a way which would obstruct the sea view from houses on B belonging to the plaintiff, who was the assignee of H.

Held, that the rights of H., under the defendant's covenant to observe the covenants in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants.¹

Held, further, that even if by reason of the surrender the covenant was gone, the plaintiff was entitled to an injunction on equitable grounds, for that what the defendant had said to H. amounted to a representation, that the defendant could not during the term of his lease build otherwise than in a particular way, which representation he was bound to make good.²

Jorden v. Money, 5 H. L. Cas. 185, explained.

THIS was an appeal by the defendant Stratton from a decree made by Vice-Chancellor Wood, restraining the defendants Stratton and Harbour from building on a certain piece of land any messuages not standing alone and detached, or not having between every two of them an open space of thirty feet at least.

By an indenture of lease, dated the 12th of November, 1845, and made between the late Sir Richard Simeon of the one part, and the defendant Stratton of the other part, in consideration of the rents and covenants therein contained and reserved on the lessee's part to be paid and performed, Sir Richard Simeon demised to Stratton, his executors, administrators, and assigns, three pieces of land on the sea coast in the Isle of Wight, marked in the plan drawn in the margin of the indenture

* 34 with the letters * A, B, and C, for the term of 999 years, from the 6th of July, 1845. This indenture contained (amongst other covenants) covenants by Stratton, for himself, his heirs, executors, administrators, and assigns, with Sir Richard

¹ As to injunctions to restrain the erection of buildings in breach of covenants not to build in a particular manner or on a particular site, see *Coles v. Sims*, 5 De G., M. & G. 1, note (2); *Lloyd v. London, Chatham, & Dover Railway Co.*, 2 De G., J. & S. 568; *Linzee v. Mixer*, 101 Mass. 512; *Parker v. Nightingale*, 6 Allen, 341; 2 *Sugden V. & P.* (8th Am. ed.) 596, 597; 2 *Dan. Ch. Fr.* (4th Am. ed.) 1654, note (4); *Kerr Inj.* 522, 523, 532, 533; 2 *Story Eq. Jur.* § 956.

² See *post*, 49, and citations in note 1.

Simeon, his heirs and assigns, that Stratton, his executors, administrators, and assigns, should, within the period of three years, to be computed from the 6th of July, 1845, build and completely finish, in a substantial and workmanlike manner, upon some part of the premises, at least two good and substantial brick or stone messuages or dwelling-houses, with suitable outbuildings, and which, in the opinion of the surveyor for the time being of Sir Richard Simeon, his heirs or assigns, should be of the value of 1500*l.* each, at the least; and that in case Stratton, his executors, administrators, undertenants, or assigns, should build on the premises more than two messuages, then each additional messuage should be substantially built of brick or stone, and should be, in the opinion of the surveyor, of the value of 500*l.* at the least; and that every such additional messuage or dwelling-house should stand alone and detached; and that between every two such additional messuages or buildings there should be an open space of thirty feet at the least.

The lands comprised in the above lease were situate near the sea-shore. The piece of land marked C, lay between the piece of land marked B and the sea, and was the only land upon which buildings could be erected so as to obstruct the sea view from houses built upon the piece of land marked B.

After the granting of this lease, Stratton entered into negotiations with several persons to grant them underleases of portions of the property, and, amongst others, with the defendant Harbour for an underlease of part of plot B, for the purpose of building marine villas upon *it. Harbour, who was a builder, * 35 asked Stratton what buildings could be erected on plot C. Stratton replied that he (Stratton) could not build houses on C at a less distance than thirty feet from each other, because his lease forbade his doing so. Harbour inspected the draft of the lease, and being satisfied with such a restriction as to the houses to be built on plot C, he agreed to take the underlease, and by an indenture dated the 17th of December, 1851, and made between Stratton of the one part, and Harbour of the other part, in consideration of the rents and covenants thereafter reserved and contained on the lessee's part to be paid and performed, Stratton demised and leased to Harbour a portion of the piece of land marked B, for the term of 970 years, at the yearly rent of 18*l.* And in the same indenture was contained a covenant by Harbour

with Stratton, that he (Harbour) would, within one year from the date thereof, erect and completely finish, in a substantial and workmanlike manner, a good, substantial stone or brick messuage or dwelling-house on some part of the land thereby demised, and which, in the opinion of the surveyor for the time being of Sir Richard Simeon, or his heirs, should be of the value of 300*l.* at the least, or, in lieu of such house, should build two semi-detached dwelling-houses under the same roof, which together should, in the opinion of the same surveyor, be worth 500*l.* And, by the same underlease, after a recital that the land thereby demised was (with other lands) granted and demised by Sir Richard Simeon to Stratton by an indenture of lease of the 12th of November, 1845, for the term of 999 years, subject to the rent and covenants therein reserved and contained, Stratton, for himself, his heirs, executors, administrators, and assigns, covenanted with Harbour, his executors, administrators, and assigns, that he (Stratton), his executors, administrators, and assigns, would

* 36 thenceforth pay the rent and observe * the lessee's covenants reserved and contained in the same lease, and effectually keep indemnified Harbour, his executors, administrators, and assigns, therefrom and from all actions, suits, and other proceedings, loss, costs, charges, damages, and expenses by reason of the non-payment or non-performance of the same rent and covenants, or either of them, or by reason of any other matter or thing relating thereto. Harbour, by the same indenture, covenanted with Stratton to perform, on his part, as to the land in the underlease, the covenants contained in the original lease of November, 1845.

Upon obtaining this underlease, Harbour proceeded to erect two semi-detached messuages on the piece of land therein comprised; and by an indenture dated the 15th of November, 1853, he assigned the land, with the messuages upon it, to the plaintiff, her executors, administrators, and assigns, for the then residue of the term of 970 years granted by the underlease of the 17th of December, 1851, subject to the rent and covenants.

In the year 1854, Stratton surrendered the original lease of the 12th of November, 1845, to Sir John Simeon, the successor of Sir Richard Simeon, and, in consideration of such surrender, obtained from Sir John a new lease of the property therein comprised, with covenants as to building differing from those contained in the

original lease, and so as to allow of his building upon the land marked C without keeping an interval of thirty feet between every two of the buildings to be erected by him.

On the 2d of June, 1857, Stratton underlet to the defendant Perkis a part of the land marked C, lying opposite to Mrs. Piggott's houses. Perkis some time afterwards parted with his interest to Harbour, who, with Stratton's concurrence, and as it was stated under an indemnity from him, commenced building on this piece * of ground houses at a much less interval than thirty * 37 feet from each other, though in accordance with the terms of the lease from Sir John Simeon to Stratton. These houses were so placed that when completed they would shut out the sea view from the plaintiff's houses, which view would not have been seriously affected if they had been built thirty feet apart. The plaintiff then filed her bill against Stratton and Perkis to restrain such building, and on Harbour's interest being discovered he was made a party by amendment. On the 18th of November, 1858, the plaintiff obtained an interlocutory injunction against Harbour. On the 19th of April, 1859, the case was heard on motion for decree, and Vice-Chancellor Wood made a decree (a) dismissing the bill without costs as against Perkis, continuing the injunction against Harbour for the residue of his term of 970 years, and granting an injunction to restrain Stratton during the term of 970 years, his workmen, servants, and agents, from building on the piece of land marked C, or any part thereof, any messuages or dwelling-houses not standing alone and detached, or not having between every two of such messuages or buildings an open space of thirty feet at the least.

The defendant Stratton appealed from this decree.

Mr. Rolt and *Mr. Southgate* for the plaintiff, in support of the decree. — We contend, first, that, apart from all representations by Stratton, there is a covenant binding on Stratton. The covenant to observe the covenants of the original lease has the same effect as if those covenants were repeated *verbatim* in the underlease under which the plaintiff claims. *Doughty v. Bowman*. (b) The Vice-Chancellor considered, however, that the obligation * towards Harbour to perform the covenants of the * 38 original lease existed only while that lease subsisted, thus

(a) Johns. 341.

(b) 11 Q. B. 444, 454.

reducing the covenant by Stratton with Harbour to a covenant not to act in any such way as to enable the ground landlord to defeat Harbour's title. We say, on the contrary, that under the covenant in the underlease Harbour acquired a right to have the covenants in the original lease observed by Stratton *modo et formâ*, so far as Harbour was interested in their being observed, and that this right could not be defeated by any dealing between Stratton and the ground landlord to which Harbour was not privy. *Doe v. Pyke.* (a) The covenant to indemnify Harbour from the consequences of a breach of the covenants does not affect the covenant not to break them. *Davenport's Case.* (b)

Then, as to the purely equitable part of the case, we say that Stratton made to Harbour representations which he is not at liberty to falsify. He knew that Harbour was taking the ground on a building speculation, that the representations must have materially influenced Harbour in taking it, and that Harbour spent money on the land on the faith of that representation. Stratton, therefore, is bound. *Evans v. Bicknell,* (c) *Saward v. Arstey,* (d) *Richards v. Syme.* (e) The case is not like *Jorden v. Money.* (g) The decision of the House of Lords in that case proceeded on the ground that there was nothing but an expression of an intention, with an express repudiation of any legal obligation to carry out that intention. Here there was a positive statement of the fact that Stratton could not build.

Mr. Roundell Palmer, Mr. Daniel, and Mr. C. T. Simpson

* 39 for the appellants. — * The doctrine of representations as distinguished from agreements does not apply here. That doctrine is correctly laid down in *Sugd. V. & P.* (h) The misrepresentation must be a misrepresentation of a material fact known to the person making the statement, and not known to the other party. The statement must be untrue, and the person to whom it is made must be misled by it. Here the statement made was true. The purchaser did not rely on it, but inquired for himself, so even had it been untrue he would have had no ground for complaint: but it was not untrue. The vendor represented no

(a) 5 M. & Sel. 146, 154.

(b) 8 Rep. 144.

(c) 6 Ves. 174.

(d) 10 Moore, 55; 2 Bing. 519.

(e) 2 Eq. Ca. Ab. 617.

(g) 6 H. L. Cas. 185.

(h) Page 272 (11th ed.).

more than that there was a covenant restraining him from building. That was really the case, and it was for the purchaser to judge how far he would rely on such a restraint.

[THE LORD CHANCELLOR. — Suppose the vendor had at the time made up his mind to surrender the lease and take a new one. How would the case then stand?]

That would raise a different equity, it would have been against good faith. In the actual case there was no *mala fides*; the vendor never agreed not to build. What the purchaser relied on was that there was a covenant making it impossible for the vendor to do a certain act without the consent of the landlord, which was not likely to be given. Suppose A. for a premium paid him by B. admits B. into partnership with him, nothing being said as to the terms, the Court could not restrain A. from dissolving the partnership at any time; though if there was any thing from which it could be inferred that A. had from the first the intention of dissolving immediately after receiving the premium, it might probably grant relief. The purchaser here knew the whole circumstances and what he had to depend upon. *Jorden v. Money* (a) fully supports the principle on which we rely, and which had been previously acted * upon in *Pickard v. Sears*, (b) as * 40 explained in *Freeman v. Cooke*. (c) Either the plaintiff must make out that a fact was misrepresented, or he must call upon the Court to imply a further declaration by him that he would not get rid of this covenant.

[THE LORD CHANCELLOR. — May not his words be considered to involve a representation that he could not get rid of it?]

If he had simply said that he could not build, that might have been so; if he had said that, and no further inquiry had been made, he might have been held to have made a representation that he was completely restrained from building, and might have been bound to make that representation good; but all he did was to state that he was restrained by a particular covenant, which covenant the purchaser inspected. According to *Jorden v. Money* the purchaser ought to have made it matter of contract, and obtained

(a) 5 H. L. Cas. 185. (b) 6 Ad. & El. 469. (c) 2 Exch. 654.

from the vendor a covenant that he would not build. Now the Court cannot imply such a contract, it cannot go beyond the terms which the parties have embodied in a solemn deed. *Monypenny v. Monypenny*, (a) *Anderson v. Fitzgerald*, (b) *Squire v. Campbell*, (c) *North British Railway Company v. Tod*. (d) If there was such a contract it was only by parol, and the Statute of Frauds is a defence. The contract being wholly denied we were not obliged to claim the benefit of the statute. *Ridgway v. Wharton*. (e)

The question then remains, does the purchase-deed contain such a contract. On this point the judgment of the Vice-Chancellor is in our favour. There is a simple recital of the existence of the

lease showing liability to rents and covenants, and it is * 41 evident that the covenant * on which the plaintiff relies was intended merely as a covenant to indemnify against the claims of the landlord, not as a covenant for a distinct, independent purpose. The covenant to pay rent can only refer to the rent reserved by the subsisting lease, and cannot continue beyond it; and it is straining the language of the covenant to hold it as meaning more than that the vendor will observe all the covenants in the original lease, so as to prevent the purchaser's title from becoming liable to be defeated by the landlord. Any such construction would be very inconvenient; for if the covenant is to be treated as in force when the original lease is gone, Harbour might still sue Stratton for not observing the covenants in the original lease, and that Harbour could not be injured by their not being observed, would be no defence: *Saward v. Arstey*; (g) or he might obtain an injunction to prevent acts inconsistent with them: *Dickinson v. Grand Junction Canal Company*. (h)

Mr. Rolt, in reply. — Indemnity against the claims of the landlord was no doubt one object of the covenant by Stratton with Harbour, but not the only object. The effect of this covenant was, we contend, the same as if the covenants of the original lease had been inserted in the underlease. There is no sufficient reason for determining the operation of the covenant by the surrender of the lease. The surrender of an old lease and taking a new one does not affect

(a) 4 K. & J. 174; 3 De G. & J. 572.

(b) 4 H. L. Cas. 484.

(c) 1 Myl. & Cr. 459, 479.

(d) 12 Cl. & Fin. 722.

(e) 3 De G., M. & G. 677.

(g) 10 Moore, 55; 2 Bing. 519.

(h) 15 Beav. 260.

the interest of a sub-lessee: 4 Geo. 2, c. 28, § 6; *Doe v. Pyke*. (a) The covenant therefore remains in force so far as Harbour has an interest in having the covenants of the old lease observed, and no practical inconvenience would arise: if he were to sue at law for breach of a * covenant which did not concern him, * 42 he would only get nominal damages, and a Court of Equity would not grant an injunction.

As to the equitable question, the appellants say: 1. If Stratton's statement be treated as a statement of fact, it was true, and therefore no equity arises. 2. If it was an erroneous representation of law, it only put Harbour on inquiry. 3. That if not one or the other, it was an expression of intention; and, according to *Jorden v. Money*, not binding. There is a fallacy in each of these positions. Stratton's statement was a mixed statement of fact and law, and was not true. It was so, indeed, in the letter, but what he said was intended to induce a belief that he could not alter the existing state of things; it came in effect to this: "There is such a state of things that I cannot build, and never shall be able to build." If what Stratton said was not a false representation, it was a parol contract. *Jorden v. Money* has no bearing on the case. The House of Lords there came to the conclusion that no contract was intended, that there was nothing but an expression of intention, an intention which the person expressing it was left at liberty to change. To make this case analogous to that, Stratton should have said: "I can get rid of that covenant, but you may trust to my honour that I will not." Now, taking it to be a case of parol contract, the consideration having been paid, and possession taken, so as to remove all objection on the ground of its not being in writing, the only difficulty in our way is, that the terms ought to have been embodied in the assignment. The dicta of Lord COTTENHAM, in *Squire v. Campbell*, are to be understood with this qualification, that they apply only to the case of something indivisibly connected with the rest of the contract, and which cannot be inserted * without alter- * 43 ing the whole. In the case of *Heriot's Hospital*, (b) the general rule is laid down that the contract is to be looked for only in the final instrument; but there is nothing in that case or *Squire v. Campbell* to interfere with the addition of such a term as that in the present case; a term the object of which is only to make

(a) 5 M. & Sel. 146.

(b) 2 Dow, 301.

secure for the future something which is secured for the present.

Judgment reserved.

November 12.

THE LORD CHANCELLOR. — I am of opinion that the decree appealed against ought to be affirmed.

The injunction was claimed on two grounds: 1st, on the legal construction of a covenant entered into by Stratton to Harbour in an indenture of lease dated 17th December, 1851; 2d, upon an equity arising from a parol representation made by Stratton to Harbour before and at the time when this lease was granted, and from Stratton's subsequent conduct in encouraging Harbour to act on that representation.

The Vice-Chancellor held that the plaintiff was not entitled to the injunction on the first ground, but was entitled to it on the second.

It seems to me that on either ground the injunction may be supported.

The first question depends upon whether Stratton is to be considered, after surrendering to Sir Richard Simeon the lease * 44 of 1845, as under a covenant to Harbour not * to build houses on the land marked C in that lease, so as to obstruct the sea-view from houses built on the land marked B; and this depends entirely upon the construction of the underlease of 1851, from Stratton to Harbour, regard being had to certain facts then existing. These facts are, that by the lease of 1845 Sir Richard Simeon had demised to Stratton for 999 years a part of his estate in the Isle of Wight, on the Solent, consisting of three plots marked A, B, and C, and Stratton had covenanted that he would not build houses on C without a certain interval between them, which would have permitted a sea-view across C from houses built on B; that in the year 1851 Stratton proposed to underlet to Harbour for 970 years a considerable part of the plot marked B for the purpose of building marine villas upon it; that the value of such land depended materially upon the houses to be erected upon it having a view of the sea; that Harbour, during the negotiation had expressed solicitude upon this subject, and that, to quiet him, Stratton said that he Stratton was bound by his lease of 1845 not to build houses which could have this effect. Under these circum-

stances, the underlease of 1851 was executed, containing a covenant by Stratton to Harbour, by which, after a recital of the lease of 1845, Stratton "for himself, his heirs, executors, administrators, and assigns, covenanted with Harbour, his executors, administrators, and assigns, that he, Stratton, his executors, administrators, and assigns, would thenceforth observe the lessee's covenants contained in the same lease." The underlease does not repeat the words of the covenant in the lease as to the interval to be left between the houses to be built on C. But *verba relata inesse videntur*; and, according to the *dictum* of PARKE B., in *Doughty v. Bowman*, (a) "a covenant to perform the covenants of a lease has no *other effect than if the former covenants had been *45 inserted." I conceive, therefore, that this covenant in the underlease was tantamount to a covenant by Stratton for himself, his heirs, executors, administrators, and assigns, not to build houses on C without leaving the stipulated interval between them. Is not this covenant still binding upon Stratton? He admits that it was binding upon him till he surrendered the lease of 1845, and that till then an injunction might have been obtained by Harbour against his building houses on C contrary to the covenant. He now relies upon the surrender. I entirely concur in the general maxim that a covenant to perform the covenants of a lease is only binding during the subsistence of the lease. But, looking to the covenant in this underlease, it is evident to me that the parties intended that, in as far as it conferred any benefit upon Harbour, it should remain in force during the currency of the underlease. Harbour acquired a material benefit by Stratton's covenant to him to perform the covenant in the lease from Sir Richard Simeon as to the mode in which the houses were to be erected between B and the margin of the Solent. It cannot properly be called an easement or a servitude over C, but Harbour acquired a right to an amenity, which materially enhanced the value of the land which was sublet to him, and restrained the use of part of the land demised to Stratton. If there had been in the underlease a direct, express, specific covenant by Stratton that, during the currency of the underlease, he would not build upon C so as to injure the prospect from B, it was not contended that this covenant would have been affected by the surrender. But I conceive that the covenant to

(a) 11 Q. B. 454.

perform all the covenants in the lease, which contained such a covenant, is an exact equivalent. When Stratton had sublet B, at the same time restraining the mode of enjoying C during the currency of the underlease, he could not by any surrender * 46 *derogate from the right which Harbour had acquired.¹

Harbour was a stranger to the surrender, and could not be prejudiced by it. With respect to strangers, the estate out of which an interest has been granted to them is supposed to continue after the surrender. Thus, "if tenant for life grant a rent-charge, and after surrender, yet the rent remaineth; for to that purpose he that is the surrenderee cometh in under the charge." (a) So in *Davenport's Case*, (b) tenant for fifteen years of a rectory to which the advowson of a vicarage was appendant, having granted the next presentation to the vicarage if it should become vacant during the term which the grantor had in the rectory, surrendered his term to the reversioner; the vicarage became void before the expiration of the fifteen years, and in *quare impedit* the question arose, whether the surrender which as between the parties had put an end to the term for years had extinguished the right of the grantee to the next presentation. Held, that it had not, because the term, for the benefit of the grantee, had to some respect continuance, although *in rei veritate* it was determined. In *Doe d. Beadon v. Pyke*, (c) the same doctrine was laid down and acted upon, Lord ELLENBOROUGH saying, "We consider it clear law that though a surrender operates between the parties as an extinguishment of the interest, it does not operate as to third persons who at the time of the surrender had rights which such extinguishment would destroy, and that as to them the surrender operates only as a grant, subject to their right." Therefore if Stratton, before the surrender of the lease of 1845, is supposed to have covenanted in the underlease to Harbour so as to give Harbour an interest in any part of the land demised by the lease of 1845, upon that interest the subsequent surrender could have no operation. That

* 47 such was the intention of the * parties when the underlease of 1851 was executed, I cannot doubt, and I think that this intention is sufficiently manifested by the language they have employed. To get at the intention of covenants it is not necessary to look for any technical form of words. The principles on which

(a) Co. Litt. 338 b.

(b) 8 Rep. 144 b.

(c) 5 M. & Sel. 146.

¹ See Kerr Inj. 500; *M'Intyre v. Belcher*, 14 C. B. N. S. 654.

covenants are to be construed are elaborately and lucidly laid down and illustrated in the judgment of Lord Chancellor CHELMSFORD, in the late case of *Monypenny v. Monypenny*, (a) in which he overruled (I think very properly) the judgment of the common-law Judges who had departed from these principles.

. If there was such an existing covenant by Stratton to Harbour, it is admitted that Harbour, before the assignment of his term to the plaintiff, would have been entitled to the injunction; and that the injunction granted to the plaintiff, the assignee of his term, cannot be impeached.

But supposing that there had been no covenant on which Harbour could have maintained an action at law against Stratton for building a row of houses continuously on C, I am of opinion that, on equitable grounds, the injunction was properly granted. The evidence on this subject was in some degree conflicting, and, almost at the close of the argument on this appeal, an application was made that Stratton and Harbour might be examined *vivâ voce* before us. No such application was made in the Court below, and there — as we learn from a very accurate reporter (b) — “the Court was satisfied of the truth of Harbour’s statements.” Now, to re-examine the parties would be most dangerous after long legal discussions on the materiality of controverted facts, and to satisfy my mind this is wholly unnecessary; for on the points on which Stratton and Harbour differ the probability is strongly in favour of the testimony of Harbour, and his evidence is materially corroborated by other witnesses. * Harbour being an experienced builder as well as Stratton, the importance of preserving the sea view was well known to both, and it would have been strange if Harbour had not mentioned this to Stratton during their negotiations, and equally strange if no reference had been made by Stratton to the covenant in his lease by which it would be preserved. And it is sworn that Stratton had made similar representations when negotiating for subletting to others another part of the land demised to him by the lease of 1845. I give faith to the evidence of Harbour, who swears thus: “I put the question about buildings in front to the defendant Stratton, and he told me he could not build closer than 30 feet, because the lease from Sir Richard Simeon forbade him, and thereupon I was induced to take

(a) 3 De G. & J. 572.

(b) Johns. 346.

the land ; and further, in order to satisfy myself, I asked for and was shown the draft of the lease." Harbour then consented to take the underlease, and with the knowledge of Stratton expended large sums of money upon the land comprised in the underlease, under the expectation of the continued benefit of the restriction imposed on Stratton by the covenant in the original lease. I agree with the Vice-Chancellor in thinking the following to be the fair effect of the evidence: "Harbour, in negotiating with Stratton for the sub-lease of the property, was doing so, as Stratton well knew, with a view to build upon the land ; with that view he asked a question very material to enable him to form an estimate as to the value of the property. Stratton's answer is, 'you need be under no apprehension on the subject ; the land between that which I am selling to you and the sea is in my hands as lessee for this long term of years, and I cannot build upon it so as to obstruct the sea view, for I am bound by my lease not to do so.'"

Stratton having received the price of the land, enhanced * 49 by the security of the sea view, and having stood * by while he saw Harbour erect houses on the property sublet, which were valuable, enjoying the sea view, but would be almost worthless without it, is it consistent with equity and good conscience that Stratton, to make an increased profit of the land which he had not sublet, should be allowed to build houses upon it contrary to the covenant in his lease from Sir Richard Simeon, so as entirely to obstruct the sea view enjoyed by the houses of Harbour ?

No attempt has been made to defend the good faith or to palliate the perfidy of such a transaction. But the counsel for the appellant, in the proper discharge of their duty, have, with much ingenuity and ability, offered various technical objections to the injunction being granted on equitable grounds.

First, they contend that if there was no covenant, the injunction must rest on a parol promise, which, as it respects an interest in land, is void by the Statute of Frauds. If the remedy sought did rest on contract, we must bear in mind that there was a valuable consideration for the promise, and that there has been part performance. But I apprehend that the injunction is to be supported on the well-established doctrine, that if A. deliberately makes an assertion to B. intending it to be acted upon by B., and it is acted upon by B., A. is estopped from saying that it was not true. If it turns out to be false, A. is answerable for the damage which may

have accrued to B. from having acted upon it, and B. is entitled, in respect of any thing done in the belief that it was true, to object to any denial of its truth by A. This doctrine is to be found in *Pickard v. Sears*, (a) and a series of subsequent decisions.¹

* But it is argued that the representation, to have this * 50 effect, must be false ; whereas all that Stratton asserted was strictly true ; for when he made the assertion the lease from Sir Richard Simeon had not been surrendered, and, while that lease remained in force, he was bound not to build so as to intercept the sea view ; he only said " I am bound," and so he was till the surrender. But moralists and jurists tell us that words are to be understood in courts of justice in the sense in which the person using them wished and believed that they should be understood by the person to whom they were addressed. Must not Harbour have understood the answer to his question to mean, that Stratton was bound during the currency of his lease, and that during the currency of the underlease he, Harbour, would be safe from the apprehended obstruction ? Must not Stratton have wished Harbour so to understand his answer ? Therefore, after Harbour executed the underlease, and, Stratton looking on, erected the houses on the faith of the assertion, Stratton is not at liberty to deny that he was under the obligation. How it arose is immaterial, and he can no more oppose the injunction than if there had been an actual continuing covenant legally binding upon him.

Next, it was said that all are supposed to know the law, and that Harbour must be supposed to have known that the lease of 1845 might be surrendered, and that he ought to have required a covenant from Stratton not to surrender the lease, or an express covenant that on the land demised to Stratton there should be no buildings erected to interrupt the sea view. But if Stratton's representation had been sincere and faithful, all such precautions were unnecessary, and the business of life could not be conducted if it were required that men should anticipate and expressly guard against the wily devices to which the deceitful may resort.

(a) 6 Ad. & El. 469.

¹ See Kerr Inj. 34 ; Kerr F. & M. (1st Am. ed.) 54 ; Hutton v. Rossiter, 7 De G., M. & G. 9, note (1), and cases cited ; Andrews v. Lyons, 11 Allen, 349 ; Turner v. Coffin, 12 Allen, 401 ; Bigelow Estoppel, 473 *et seq.* ; 1 Sugden V. & P. (8th Am. ed.) 4, and cases in note (d) ; 11 Law Reg. (Aug. 1872) N. S. 485, 491.

* 51 * The argument, however, chiefly relied upon for the appellant was that what Stratton said during the negotiation in reference to the sea view results merely in the expression of intention, and that the case of *Jorden v. Money* (a) is a conclusive authority in his favour. I am bound to suppose this case to have been properly decided by the majority of the members of the House who voted upon it. But in considering the doctrine of law which it establishes, I must look to the facts which those who decided it considered to be proved by the evidence. I cannot look at that evidence and say that different inferences are to be drawn from it, and that the law laid down is accommodated to these inferences. The majority of the Lords thought that nothing more was proved than the declaration of a present intention not to enforce the bond. Therefore it is not legitimate reasoning, after comparing the evidence there with the evidence in this case, to argue that there, as much as here, a positive assertion of a fact had been made. The doctrine there laid down and acted upon was, that where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. This is the *ratio decidendi*, and this only is binding upon us. We are not called upon to give any opinion upon the point of law on which the law lords were divided as to the difference between a misrepresentation of a fact as it actually existed, and a misrepresentation of an intention to do, or to abstain from doing, an act which would lead to the damage of the party thereby induced to do an act on the faith of the representation.¹ Taking the law as there laid down,

* 52 that a mere expression of intention, * although acted upon, is no ground for equitable interference, we are to say whether in this case, considering the evidence, we come to the conclusion that there was here a mere expression of an intention not to do an act. Now, according to my conclusion upon the evidence, Stratton absolutely asserted that there was no power to do the act, and that the act could not be done during the currency of the lease. There was no room left for change of intention. It would be childish to suppose that he meant to be understood to say that, although he then had no power to do the act, he might afterwards

(a) 5 H. L. Cas. 185.

¹ See Kerr Inj. 38, 39; Kerr F. & M. (1st Am. ed.) 89, 90.

acquire the power by surrendering the lease. He clearly gave Harbour to understand that he would have no power to disturb the sea view during the currency of the lease, and that during the currency of the lease the sea view could not be disturbed.

For these reasons I am of opinion that the appeal ought to be dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me also that the rights of the plaintiff against the defendant Mr. Stratton are substantially or exactly the same as they would have been if the surrender by Mr. Stratton to his landlord had not taken place; and without giving any opinion on the case made by the plaintiff as to oral representations, I think the decree correct on the ground of the covenant by Mr. Stratton contained in the underlease of the 17th of December, 1851. The appeal ought in my judgment also to be dismissed with costs.

THE LORD JUSTICE TURNER. — This case has been so entirely exhausted by the judgment of the Lord Chancellor that I have nothing to add. I think the case entirely distinguishable from *Jorden v. Money*.

* *Ex parte* The UNDERTAKING proposed by the COLNE * 53
VALLEY AND HALSTEAD RAILWAY BILL.

1859. November 5, 10, 15. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Sanction of the Court refused to the investment, under section 32 of the Act 22 & 23 Vict. c. 35, of a trust fund in the purchase of India stock, created under the East India Loan Act, 22 & 23 Vict. c. 39. But, *semble*, by the Lord Chancellor (*dubitantibus* the Lords Justices) that a trustee making such an investment on his own responsibility would not be guilty of a breach of trust.¹

THE question in this case was, whether the Court would sanction the investment of a trust fund in the stock created by the East India Loan Act, 22 & 23 Vict. c. 39.

¹ See *Cockburn v. Peel*, 9 W. R. 725; S. C. 3 De G., F. & J. 170; *Re Langford's Trusts*, 8 Jur. N. S. 114; *Re Fromow*, 8 W. R. 272; 2 Dan. Ch. Pr. (4th Am. ed.) 1791; *Lewin Trusts* (5th Eng. ed.) 253.

The matter was first brought before Vice-Chancellor Wood, upon a petition presented by the promoters of the above-mentioned railway undertaking, praying the investment in the stock in question of the sum of 7200*l.* deposited in Court under the standing orders of both Houses of Parliament pending the application for a bill for the construction of the railway.

It was alleged upon the petition that the Court had authority to sanction the investment under the 32d section of the Act, 22 & 23 Vict. c. 35 (commonly called Lord St. LEONARDS's Act), which received the royal assent on the same day as the East India Loan Act, 22 & 23 Vict. c. 39.

The 32d section of 22 & 23 Vict. c. 35 enacts, that "when a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not * 54 be liable on that account as for a breach of * trust, provided that such investment shall in other respects be reasonable and proper."

The Vice-Chancellor, after expressing a doubt whether the India stock mentioned in the clause was intended to include the new stock about to be created under the India Loan Act, 22 & 23 Vict. c. 39, and refusing to sanction the investment asked for, suggested that the matter should be brought to the attention of the Court of appeal, together with a written statement which he handed down as explanatory of his own view of the question.

The statement was in the following terms:—

"The application made to me by the petition was that money might be invested in the new 5*l.* per cent Indian loan, 1859, on the ground that such a course would be authorized by Lord St. LEONARDS's Act of last session, authorizing investments by trustees in bank stock or East India stock.' My difficulty was this: At the date of the passing of Lord St. LEONARDS's Act, the two stocks called bank stock and East India stock were well known to be the capital stock of the two great companies incorporated by charters confirmed by Acts of Parliament, and the dividend on the East India stock was, moreover, guaranteed by Parliament until it should be

paid off by government. The India 5l. per cent loan is, indeed, in the form of a stock, transferable in books kept for that purpose; but it is a loan to the Indian government, and not the capital stock of a company, neither is it guaranteed by the British government. The only way in which the question arose as to the time of passing the Act creating the loan stock and the Act of Lord ST. LEONARDS was this: It was suggested that, had the Loan Act been actually passed, the legislature might, in passing Lord ST. LEONARDS'S Act, have had reference to the new * 55 stock that would be created by the Loan Act, but even this suggestion failed when it was shown that it was not so passed."

November 5.

Mr. Mayhew, in support of the petition, submitted the statement to the Court, and asked for an expression of their Lordships' opinion whether the investment prayed could be sanctioned or not.

After some discussion the consideration of the petition was adjourned to give an opportunity for bringing before the Court all the material Acts relating to the old East India stock.

November 10.

The petition was again brought on on this day.

Mr. Mayhew, in support of the petition. — The origin, history, and present state of the old East India stock appear from the Acts 26 Geo. 3, c. 62; 29 Geo. 3, c. 65; 33 Geo. 3, c. 47; 3 & 4 Will. 4, c. 85, and 21 & 22 Vict. c. 106. The provisions which relate to the guarantee of that stock are the 9th, 14th, 16th, and 17th sections of the Act 3 & 4 Will. 4, c. 85, and the 42d section of the Act 21 & 22 Vict. c. 106, which are as follows: —

The 3 & 4 Will. 4, c. 85, § 9, enacts: —

"That from and after the 22d day of April, 1834, all the bond debt of the East India Company in Great Britain, and all the territorial debt of the said company in India, and all other debts which shall on that day be owing by the said company, and all sums of money, costs, charges, and expenses which after the said 22d day of April, 1834, may become payable by the said company in respect or by reason of any covenants, contracts, or liabilities then existing, and all debts, expenses, and liabilities whatever * which * 56 after the same day shall be lawfully contracted and incurred

on account of the government of the said territories, and all payments by this Act directed to be made, shall be charged and chargeable upon the revenues of the said territories; and that neither any stock or effects which the said company may hereafter have to their own use, nor the dividend by this Act secured to them, nor the directors or proprietors of the said company, shall be liable to, or chargeable with, any of the said debts, payments, or liabilities."

Section 14 enacts, "That there shall be paid by the said company into the Bank of England, to the account of the commissioners for the reduction of the national debt, such sums of money as shall, in the whole, amount to the sum of two millions sterling, with compound interest after the rate of three pounds ten shillings per centum per annum, computed half-yearly from the said 22d day of April, 1834, on so much of the said sums as shall, from time to time, remain unpaid; and the cashiers of the said bank shall receive all such sums of money and place the same to a separate account with the said commissioners, to be intituled 'The Account of the Security Fund of the India Company,' and that as well the moneys so paid into the said bank as the dividends or interest which shall arise therefrom, shall from time to time be laid out, under the direction of the said commissioners, in the purchase of capital stock in any of the redeemable public annuities transferable at the Bank of England, which capital stock so purchased shall be invested in the names of the said commissioners on account the said security fund, and the dividends payable thereon shall be received by the said cashiers and placed to the said account, until the whole of the sums so received on such account shall have amounted to the sum of twelve millions sterling: and the

* 57 said moneys, stock, and * dividends or interest shall be a security fund for better securing to the said company the redemption of their said dividend after the rate hereinbefore appointed for such redemption."

Section 16: "Provided always, and be it enacted, that all dividends on the capital stock forming the said security fund, accruing after the moneys received by the said bank to the account of such fund shall have amounted to the sum of twelve millions sterling, until the said fund shall be applied to the redemption of the said company's dividend, and also all the said security fund, or so much thereof as shall remain after the said dividend shall be

wholly redeemed, after the rate aforesaid, shall be applied in aid of the revenues of the said territories."

Section 17 enacts, "That the said dividend on the company's capital stock shall be paid or retained as aforesaid out of such part of the revenues of the said territories as shall be remitted to Great Britain, in preference to all other charges payable thereout in Great Britain; and that the said sum of two millions sterling shall be paid in manner aforesaid out of any sums which shall on the said 22d day of April, 1834, be due to the said company from the public, as and when the same shall be received, and out of any moneys which shall arise from the sale of any government stock on that day belonging to the said company, in preference to all other payments thereout; and that, subject to such provisions for priority of charge, the revenues of the said territories, and all moneys which shall belong to the said company on the said 22d day of April, 1834, and all moneys which shall be thereafter received by the said company from and in respect of the property and rights vested in them in trust as aforesaid, shall be applied to the service * of the government of the said terri- * 58
tories, and in defraying all charges and payments by this Act created, or confirmed and directed to be made respectively in such order as the said court of directors, under the control of the said board, shall from time to time direct; any thing in any other Act or Acts contained to the contrary notwithstanding."

The Act 21 & 22 Vict. c. 106, § 42, enacts, "That the dividend on the capital stock of the said company secured by the 3 & 4 Will. 4, c. 85, until the redemption thereof, and all the bond, debenture, and other debt of the said company in Great Britain, and all the territorial debt and all other debts of the said company, and all sums of money, costs, charges, and expenses, which, if this Act had not been passed, would, after the time appointed for the commencement thereof, have been payable by the said company out of the revenues of India in respect or by reason of any treaties, covenants, contracts, grants, or liabilities then existing, and all expenses, debts, and liabilities which, after the commencement of this Act, shall be lawfully contracted and incurred on account of the government of India, and all payments under this Act, shall be charged and chargeable upon the revenues of India alone, as the same would have been if this Act had not been passed and

such expenses, debts, liabilities, and payments as last aforesaid had been expenses, debts, and liabilities lawfully contracted and incurred by the said company, and such revenues shall not be applied to any other purpose whatsoever; and all other moneys vested in or arising or accruing from property or rights vested in her Majesty under this Act, or to be received or disposed of by the council under this Act, shall be applied in aid of such revenues:

provided always, that nothing herein contained shall lessen * 59 or prejudicially affect any security * to which the said company, or any proprietor or creditor thereof, is or may be entitled upon the fund called 'The Security Fund of the India Company,' and mentioned in the Act of the 3 & 4 Will. 4, c. 85, § 14."

The result is, that the old India stock is a stock raised for the service of her Majesty's East Indian dominions, secured by the revenues of the East Indies, in preference to all other charges upon those revenues, with the additional security for its redemption of a fund set apart for that purpose. It has not, therefore, as the Vice-Chancellor supposed, the guarantee of the imperial exchequer; and if the East Indian revenue should be defective, the holders of the stock would not get their dividends. The stock created under the new Loan Act is also an East India stock, and under the Statute 21 & 22 Vict. c. 106, § 42, is also charged on the revenues of India. The only difference between the two kinds of stock is, that the former, having priority over the latter as a charge on the Indian revenue, and being likewise secured by a fund set apart for the purpose, may be considered on that account a better investment than the latter. The Indian revenues, however, must be presumed to be sufficient to meet all charges upon them, and the new stock ought, I submit, to be treated as a fit and proper security on which to invest a trust fund.

November 15.

The Lord Chancellor, after stating that he had, in reply to a communication which he had made to Lord ST. LEONARDS on the subject of this application, received a letter from him, in which he disclaimed being the author of the clause in question, and expressed his entire disapproval of it, said:—

I agree with Lord ST. LEONARDS in thinking that this sec-

tion of the Act is in direct opposition to the well * settled * 60 rule of equity, as to the securities upon which trust funds are to be invested, and that it may lead to jobbing with trust funds, and to the sacrifice of the interests of reversioners therein for the benefit of the tenants for life. Here, however, it stands in the Act, and what we have to do is, not to question the policy of the clause, but to put upon it such an interpretation as it appears to us the legislature intended.

Now this clause of the Act clearly enables trustees to invest their trust funds in securities which have not the imperial guarantee, as in stock of the Banks of England and Ireland, and in Scotch securities, and also in India stock, which has not the imperial guarantee, although a fund is appropriated by statute to secure the payment of the dividends; and, if called upon to give an opinion whether the words of the clause are large enough to include the stock of the East India loan of 1859, I must say that, upon the strictest interpretation, stock of that description is India stock within the meaning of the enactment.

The two Acts, viz., Lord St. LEONARDS'S Act, and the East India Loan Act, 1859, received the royal assent on the same day. The date of the commencement of an Act was formerly the first day of the session of Parliament in which it was passed, but afterwards it was referred to the day upon which it received the royal assent.

Therefore, on the day upon which these two Acts received the royal assent, the legislature enacted that it was not a breach of trust in trustees to invest their trust funds in East India stock. There was on that day an East India stock actually in existence, and there was also then existing the Act passed on the same day, * under which the stock of the new East India loan * 61 has been or is about to be created. This, therefore, is India stock, which, though not having the same incidents, is generically the same as the older stock; and, taking the language of Lord St. LEONARDS'S Act as it stands, I must say, the stock of the new loan is East India stock within the meaning of the 32d clause of the Act, and that a trustee investing in such stock would not be guilty of a breach of trust.

At the same time I do not say that the investment is one which this Court ought to sanction. If the investment had been actually made, and the application to this Court had been to make the

trustee responsible, and he had pleaded the Act of Parliament, and that he saw no reason to suppose it was an improper investment, I think the Court would have been obliged to decide in his favour. But if asked, which I assume is all that we are asked, whether this is a fit investment, I should say that it is not, and that it is our duty to advise that at present such an investment ought not to be made.

A doubt having been thrown out upon the construction of the Act of Parliament, I have thought it right to state my opinion. The enactment, however, is one which, though it stands at present in the statute book, may probably be removed from it. (a)

THE LORD JUSTICE KNIGHT BRUCE. — I confess that I think the point too doubtful to enable the Court safely to accede to what is asked, and therefore I concur in the Vice-Chancellor's conclusion.

* 62 * THE LORD JUSTICE TURNER. — I concur in the opinion that this investment ought not to be made. Whether the trustees would have been chargeable if they had made it, is another question. The only question with which we have to deal is whether this Court, in the exercise of its discretion, will sanction an investment in stock of this description. I think not.

I am by no means satisfied that this is East India stock within the meaning of the Act of Parliament; nor that upon the true construction of the Act, the clause in question applies to India stock, other than stock of the description then existing. If it is to be construed as including stock of this description, I do not see where we are to stop short of construing it as altogether prospective, or in the event of the creation of an India stock, upon whatever terms, of holding that such stock would fall also within this provision of the Act.

(a) See 23 & 24 Vict. c. 38, §§ 10, 11.

* M'GREGOR v. M'GREGOR.

* 63

1859. November 19. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A testator by his will gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one years, for their respective lives; and after the death of any of them, upon trust as to an equal portion of the moiety, proportionate to the number of his children then living, for the use of the issue of such child or children so dying absolutely for ever: *Held*, —

1. That the word "issue" included only children of the testator's children, to the exclusion of their more remote descendants;¹ and —
2. That, pursuant to the intent of the gift, and by analogy to dispositions operating under the Statute of Uses, or of dispositions operating under wills, as distinguished from conveyances operating at common law, the children of a child who died after the youngest child of the testator attained twenty-one took as joint tenants the proportionate share of the deceased child, although their respective interests in the proportionate part vested in them at different times as they respectively came into *esse*.²

THIS was an appeal from an order made by Vice-Chancellor STUART upon a petition seeking the distribution of a fund in Court according to the trusts of a will, upon the construction of which the question arose.

Alexander M'Gregor, by his will, after directing payment of his debts, funeral and testamentary expenses out of his personal estate, and after bequeathing to his wife a life interest in his household furniture, plate, linen, &c., and also in a sum of 10,000*l.*, gave, devised, and bequeathed all his residuary estate, as well real as personal, to trustees upon trust from and immediately after his decease to invest all his personal property in the parliamentary stocks or public funds; and upon further trust to receive the dividends and annual proceeds thereof, and of his other estate and effects, and invest the same in the same stocks or funds for the purpose of accumulation until his youngest child then surviving should attain the age of twenty-one years; and upon further trust, immediately after such youngest child attaining that age, to sell

¹ See 2 Jarman Wills (3d Eng. ed.) 177, 178; *Coe v. Bigg*, 1 N. R. 536.

² See *Heasman v. Pearce*, L. R. 11 Eq. 522.

all his real estate, and pay and apply one moiety of the
 * 64 moneys arising from such sale, and of the stocks and * funds
 on which the other part of his estate and effects were directed
 to be placed, together with one moiety of the said accumulations,
 and also one moiety of the rents, dividends, and proceeds thereof,
 amongst all his children who should be then living and their issue,
 in manner therein mentioned. The declaration of trust then pro-
 ceeded as follows: —

“ And upon further trust, from and immediately after such
 youngest child attaining twenty-one years, to invest the other
 moiety or equal half part of the money arising from such sale or
 sales of my estate and effects in the parliamentary stocks or public
 funds of this country, and upon trust to stand possessed thereof,
 and also of the money, stocks, funds, and securities, and other my
 estate and effects which shall remain after the aforesaid division,
 and also of the said sum of 10,000*l.* after the decease of my said
 wife, in trust to pay the interest, dividends, and annual proceeds
 thereof, share and share alike, unto and equally between and
 amongst all my children who shall be living when my said
 youngest child attains twenty-one years, for and during their sev-
 eral and respective lives, and from time to time, from and after
 the death of any of them, the said children, then upon trust to
 stand possessed of an even and equal portion of the said stock,
 funds, and securities and money, proportionate to the number of
 my children then living, for the use of the issue of such child or
 children so dying absolutely for ever. But in case of such child
 or children dying without leaving issue, then upon trust to stand
 possessed of the proportionate share of the child so dying, in trust
 for and equally to be divided between and among my other chil-
 dren then living, and the issue of such of them as may be then
 dead, such issue, nevertheless, only taking the share his, her,
 * 65 or their parent would have taken if living. And in * case
 none of my children shall have any issue, then I direct that
 the share, as well original and accruing, of my last surviving child
 shall, in the event of his or her dying without issue living at his
 or her death, go to his or her executors or administrators, accord-
 ing to his or her will, or in the usual course (in case of no will)
 according to the Statute of Distributions.”

The testator afterwards made a codicil to his will in the following terms :—

“I, Alexander M'Gregor, do hereby make this codicil to my will : whereas I have by my will directed that the shares of such of my children as shall be daughters in a moiety of my property shall be settled on them for their respective lives and afterwards as in my will is expressed, and I have also given my daughters a proportionate share in the other moiety of my property for their lives, and afterwards have devised the same as is mentioned in my will, now I do hereby direct, that the shares which in my will are given to my daughters shall pass to each of them for her respective natural life, for her own sole and separate use, without being subject to the debts or control of any husband, and that after decease the same shall go to her children, as directed in my will. And in all other respects I confirm my said will.”

Soon after the death of the testator a suit was instituted for the administration of his estate, and the Master, by his report, found that the testator had been twice married ; that he had one child only by his first and six children by his second wife ; and that the youngest of such children attained his age of twenty-one years on the 7th of September, 1840, at which time all the children were living, except the child of the testator by his first * wife, * 66 who had died in 1821 without having been married.

By the decree it was declared that one moiety of the proceeds of the sale of the testator's real and residuary personal estates, and of the accumulations directed by his will, as well as of the 10,000*l.* subject to the life interest of the testator's widow, became divisible into six equal shares, and that the income of the said six shares became payable in the manner directed by the testator's will.

On the 18th of October, 1855, Helen M'Gregor, the widow of the testator, died.

In September, 1858, James M'Gregor, one of the sons of the testator, died, leaving eleven children and one grandchild him surviving, and having had three other children, all of whom had died in infancy in his lifetime.

The petition, the order upon which was the subject of the appeal, was then presented, praying the division of the fund in which James M'Gregor had been entitled to a life interest into eleven

equal parts, and the payment of one of such equal eleventh parts to each of the eleven surviving children of James M'Gregor.

By the order under appeal it was declared that each of the eleven surviving children of James M'Gregor and the personal representative of each of his three deceased children was entitled to one-fourteenth of the share of the moiety of the proceeds of the sale of the real estate of the testator Alexander M'Gregor, and of the residuary personal estate, and of the accumulations, and of the sum of 10,000*l.* to which James M'Gregor, the deceased son of the testator, had been entitled for life under the will * 67 * and codicil of his father, and that the grandchild of James M'Gregor was not entitled to any interest therein.

The eleven surviving children of James M'Gregor and the husband of one of them appealed.

November 5, 7.

Mr. Kay, for the appellants. — The questions upon these appeals are, first, whether the word “issue” occurring in the clause of the will of Alexander M'Gregor, the testator in the clause, which is to be construed upon this petition, includes the grandchild of James M'Gregor, or whether it is to bear the restricted sense of “children;” and, secondly, whether the issue of James M'Gregor are to take his proportionate share of a moiety of the residue of the testator's estate as tenants in common or as joint tenants.

As to the first point it is submitted that, as the issue are to take, not concurrently with, but in substitution of, their deceased parent, the word “issue” is to be construed as children. *Sibley v. Perry*. (a)

As to the second question, issue on the words of the gift take as joint tenants. Co. Litt., (b) *Fearne Cont. Rem.*, (c) *Sammes's Case*, (d) *Stratton v. Best*, (e) *Oates d. Hatterley v. Jackson*. (g) *Woodgate v. Unwin* (h) is the only case against me; and the same Judge in another case, *Amies v. Skillern*, (i) decided the same point the other way. *Currie v. Gould*, (k) *Bridge v. Yates*, (l) *Mence v. Bagster*, (m) *Kenworthy v. Ward*. (n) It only remains

(a) 7 Ves. 523.

(b) Page 188 a.

(c) Page 312 (9th ed.).

(d) 13 Rep. 54.

(e) 2 Bro. C. C. 233.

(g) 2 Str. 1172.

(h) 4 Sim. 129.

(i) 14 Sim. 428.

(k) 4 Beav. 117.

(l) 12 Sim. 645.

(m) 4 De G. & Sm. 162.

(n) 11 Hare, 196.

to be considered whether *the context makes it a tenancy *68 in common. It was argued below that the issue under the gift over were to take as tenants in common; but it could not legitimately be argued from that that words of severance are to be imported into the prior gift, the inference rather would be that difference of language shows difference of intention. But in fact the issue under that gift would not take as tenants in common *inter se*, though they would with the preceding generation. *Bridge v. Yates*, (a) *Amies v. Skillern*, (b) *Campbell v. Campbell*. (c) A decision against us would revolutionize the practice of conveyancers founded on the law as laid down in Sheph. Touchst. and Blackstone, by obliging them to say "as joint tenants and not as tenants in common."

Mr. W. Downes Griffith, for issue of one of the living children of James M'Gregor. — Issue is to be read "issue," not "children," and a child takes concurrently with its parent. *Sibley v. Perry* has been cited against me to show that "issue" is correlative to "parent," and therefore means children. To make it apply in that way a specific parent ought to be pointed out. The language means that no children of any person are to take more than that person would have taken, "parent" applying in each generation. *Ross v. Ross* (d) shows that this is the right view of *Sibley v. Perry*. The argument deduced from it that "issue" means "children" throughout the will is opposed to *Dalzell v. Welch*. (e) To construe "issue" as "children" throughout the will would leave unprovided for the grandchildren of a child who left no child.

* *Mr. North*, for the mother and personal representative *69 of the deceased children of James M'Gregor, supported the Vice-Chancellor's order.

THE LORD CHANCELLOR. — We need not trouble you on the second point. It appears clear on the scope of the will that the testator by "issue" intended the children of the first takers.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

(a) 12 Sim. 645.

(d) 20 Beav. 645.

(b) 14 Sim. 428.

(e) 2 Sim. 319.

(c) 4 Bro. C. C. 15.

THE LORD JUSTICE TURNER. — I entirely agree. Whatever doubt on the point may be left by the will is removed by the codicil.

Mr. North. — As to the second question I admit that I cannot distinguish many of the cases cited against me. The question is, which way the balance of authority lies. *Bateman v. Roach* (a) is in my favour. *Woodgate v. Unwin* (b) is in all fours with the present case. In that case the children had acquired vested interests by attaining twenty-one. Here they took them on birth, as is shown by *Sturgess v. Pearson*, (c) *Middleton v. Messenger*, (d) *Re Thompson's Trust*, (e) *Kennedy v. Sedgwick*, (g) so there is no substantial distinction between *Woodgate v. Unwin* and this case. *Bridge v. Yates* (h) is distinguishable, for it was a gift to a class to be ascertained at a future period, the death of the tenant for life, when all must take at once: and so in *Amies v. Skillem.* (i) Therefore the conflict which is alleged between * 70 the *decisions of the late Vice-Chancellor of England does not exist. *Owen v. Penny* (k) agrees with *Woodgate v. Unwin*, *Head v. Randall*. (l) The Vice-Chancellor was influenced by the fact that the tenants for life were tenants in common, and he thought that, *primd facie*, this tenancy in common must be carried on through future generations, which is a reasonable view. *Cradock v. Cradock*. (m) A joint tenancy would place hindrances in the way of giving maintenance, and is an inconvenient construction.

Mr. Kay, in reply. — In *Bateman v. Roach* the point does not appear to have been raised; the judgment does not refer to it, and the words of the will are not given. The bequest in *Owen v. Penny* was executory, directing a settlement. In *Head v. Randall* the word "respectively" occurred.

Judgment reserved.

(a) 9 Mod. 104.

(b) 4 Sim. 129.

(c) 4 Madd. 411.

(d) 5 Ves. 136.

(e) 5 De G. & Sm. 667.

(g) 3 K. & J. 540.

(h) 12 Sim. 645.

(i) 14 Sim. 428.

(k) 14 Jur. 359.

(l) 2 Y. & C. C. C. 231.

(m) 4 Jur. N. S. 626.

November 19.

THE LORD CHANCELLOR. — Two questions were raised by this appeal: First. Whether the word "issue" in the will of Alexander M'Gregor included all the descendants of the children of the testator, or was confined to the children of his children? Secondly. Whether the issue of his children took as joint tenants or as tenants in common?

On the first question we intimated, during the argument, a clear opinion in accordance with the decree of *the Vice- *71 Chancellor, that the word "issue" in this will included only the children of the testator's children; for, although issue be a flexible word, and may include all the descendants of the *stirps*, in this case to hold that great-grandchildren of the testator should be let in with grandchildren, to constitute the class among whom the share of his children was to be divided, would clearly contravene the intention of the testator as expressed in several parts of his will and in his codicil.

The second point his Honor decided in favour of the respondents, — holding that the issue took as tenants in common. His Honor considered that the estate of joint tenants must vest in them at one and the same period of time, and that here the issue, *i. e.* the children of the children of the testator, did take a vested interest at different times. This fact is undoubted; for the appeal is brought respecting the second half of the residue, which substantially was given to the testator's children for life, remainder to their issue; so that each grandchild on coming into *esse* would take a vested remainder in the share of the parent. The rule of law relied upon is to be found in elementary books where defining "joint tenancy," and they add that "where the interests accrue under different titles or at different periods, this is a tenancy in common." But I have always understood that this rule is to be confined to conveyances at common law, and that it does not apply to estates raised by way of use or to wills; and I believe that such still continues to be a sound distinction, although in the argument an attempt was made to show that by the case of *Woodgate v. Unwin*, (a) before Vice-Chancellor SHADWELL, this distinction is destroyed.

The Lord Justice TURNER has been good enough to allow me to read a judgment prepared by him; and his * observa- *72

(a) 4 Sim. 129.

tions completely exhausting this part of the case, I think it only necessary to add that I entirely agree with him in the opinion that *Woodgate v. Unwin* (a) was well decided, and that the doctrine supposed to be established by it is quite erroneous.

I therefore concur in the result, that the decree appealed against must be varied by directing the distribution of the property on the principle that the issue took as joint tenants, not as tenants in common.

THE LORD JUSTICE KNIGHT BRUCE. — I am satisfied that the gift now under consideration taken alone, taken independently of the context, ought to be deemed a gift in joint tenancy. Upon the context there was room for argument that the gift ought to be deemed a gift in common as distinguished from joint tenancy. It is not, however, my opinion that the context is of sufficient strength or weight to change or affect the meaning which, without it, would have been properly ascribed to the words of the gift. I concur, therefore, in the Lord Chancellor's conclusion.

THE LORD JUSTICE TURNER. — The testator in this cause has by his will given one moiety of the residue of his estate to trustees in trust to pay the interest, dividends, and annual proceeds thereof, share and share alike, unto and equally between and amongst all his children who should be living when his youngest child should attain twenty-one, for and during their several and respective lives, and from time to time from and after the death of any of them, the said children, then upon trust to stand possessed of an even and equal portion of the said stock, funds, and securities and * 73 money * proportionate to the number of his children then living, for the use of the issue of such child or children so dying absolutely for ever.

The question on which we reserved our judgment is, whether, under this disposition, the issue (meaning, as we have already held, the children) of a deceased child of the testator took the child's proportionate part of this moiety of the residue as tenants in common or as joint tenants.

The Vice-Chancellor was of opinion that the issue took as tenants in common; but I am of opinion that they took as joint tenants. A Court of Equity no doubt leans to a tenancy in common

(a) 4 Sim. 129.

rather than to a joint tenancy; but it cannot indulge that leaning unless it can find on the context of the will some reasonable ground to rest upon. That the words "for the use of the issue of such child or children so dying absolutely for ever," taken by themselves, would create a joint tenancy cannot I think be denied, and I can find nothing in the context of this will to control their effect. It was argued, and it was upon this ground, as I understand, the Vice-Chancellor proceeded, that the issue could not take as joint tenants under this will, because their interests would vest at different times, and the case of *Woodgate v. Unwin* was cited in support of that position; but it cannot be said to be an universal rule that there can be no joint tenancy unless the interests of all the cotenants vest at the same time. If it be so in the case of conveyances operating at common law, it certainly is not so in cases of dispositions operating under the Statute of Uses or of dispositions operating under wills, where there is more scope for the intent. There are numberless cases in the books, many of which were cited in the argument, and more may be found in Cruise's Digest, title "Joint *tenancy," in which joint tenants have been held to be created, although the interests of the cotenants vested at different times; and, indeed, if there was any such general rule as is contended for, I do not see how additional members could be introduced into a joint tenancy under a springing use. * 74

There are, it is true, some observations to be found in the judgment in *Woodgate v. Unwin*, (a) which give countenance to the respondents' argument, but the learned Judge to whom those observations are attributed was so familiar with the law upon this subject that I much doubt whether the report accurately conveys what he intended to express. I think he meant no more than that in order to constitute the joint tenancy the property must vest at once, not, as in that case, at twenty-one, — adverting, as I apprehend, to the rule of law that all joint tenants must take the same quantity of interest; whereas, in the case before him, some of the cotenants might take vested, others contingent, interests. The last sentence of the judgment seems to me to bear out this view. The case of *Bateman v. Roach* (b) was also cited on the part of the respondents in the course of the argument before us, but the point does not seem to

(a) 4 Sim. 129.

(b) 9 Mod. 104.

have been argued in that case, nor does it appear what the words of the will were. No reliance therefore can be placed upon it.

Upon the whole, finding that the words of this disposition import joint tenancy, that there is no context to control them, and that the authorities do not in my judgment warrant the conclusion attempted to be deduced from them, I find myself unable to agree

in the conclusion of the Vice-Chancellor, and am of opinion
 * 75 * that the proportionate part of the deceased child must be distributed upon the footing of the issue having taken as joint tenants,—in elevenths and not in fourteenths; but I think that the costs of all parties of the appeal must first be paid out of the fund.

In the Matter of The MEXICAN AND SOUTH AMERICAN COMPANY.

HYAM'S CASE.

1859. November 9, 23. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A mining company, the shares in which passed by delivery of the certificates, being in difficulties, a shareholder, who was desirous of avoiding liability, delivered his shares to a broker, and shortly afterwards introduced to him P., who bought them at the market price, and paid for them by handing to the broker some bank shares standing in P.'s own name, which the broker sold, and after retaining the price of the mining shares, handed over the balance to P. The certificates of the mining shares were at the same time delivered to P. A few days afterwards an order was made for winding up the mining company. P. was a clerk in the employ of H., and upon investigation it turned out that the bank shares, though standing in P.'s name, belonged to H. *Held*, that the transfer of the mining shares to P. must be regarded as merely colourable, and that the name of H. must be retained on the list of contributors.¹

THIS was an appeal by the Messrs. Hyam from an order of the Master of the Rolls retaining their names on the list of contribu-

¹ See *Cox v. Jackson*, 6 Allen, 108; *Bradley v. Hale*, 8 Allen, 59; *Re National Assurance and Investment Co.*, 1 N. R. 5; *Ex parte Hunt*, 2 N. R. 50; *Weston's Case*, L. R. 6 Eq. 238; S. C., L. R. 4 Ch. Ap. 20.

ories of the Mexican and South American Company. The particulars as to the character and objects of the company, and the nature of its shares, will be found in the report of *Grisewood and Smith's Case*. (a) The shares were transferable by delivery of the scrip certificates. The order for winding up the company was made on the 24th of November, 1857. The Messrs. Hyam had bought * the scrip certificates of their shares in 1856, * 76 and continued the holders of them till November, 1857. In the early part of that month they placed them in the hands of a broker for sale, but shortly afterwards informed him that they had found a purchaser, and introduced to him a Mr. Hodson, who purchased the shares at 2s. 6d. per share, and the certificates were handed over to him. This took place about the 10th of November, at a time when the company was known to be in a state of great embarrassment, though its shares were still quoted in the market, and had a market price of 2s. 6d. per share. Mr. Hodson, who was a clerk in the employ of the Messrs. Hyam, paid the purchase-money by delivering some Ottoman Bank shares standing in his own name to the same broker to be sold. The broker sold them, retained the purchase-money of the Mexican shares out of the proceeds, and paid the residue to Mr. Hodson. The Master of the Rolls having decided that Messrs. Hyam must be on the list of contributories, the present appeal was brought.

November 9.

The Attorney-General (Sir R. BETHELL), *Mr. Selwyn*, and *Mr. Joseph Brown*, for the appellants. — The appellants were entitled to dispose of their shares to whom they would, and though their motive confessedly was to escape from liability, the transfer relieves them from liability, provided it was a *bonâ fide* out-and-out transfer, which there is no ground for disputing that it was. The case is on all fours with *De Pass's Case*, (b) and *Jessop's Case* (c) is strongly in our favour. There is no doubt that the company was in a bad state, but its shares were quoted in the market, and business in them was done on the Stock Exchange, after the date of this transfer.

* It is true that Hodson was a man of straw, but that is of * 77

(a) 4 De G. & J. 544.

(b) 4 De G. & J. 544 [(Am. ed.) note (3)].

(c) 2 De G. & J. 638.

no importance. In a company whose shares are transferable by delivery of the certificates, there is no such mutual confidence or privity of contract as to make it unlawful to transfer to a pauper any more than it is unlawful for an assignee of a lease to do so.

Counsel for the official manager applied for a further examination of witnesses, stating that there had lately come to the knowledge of the official manager facts materially bearing on the case. The appeal accordingly stood over till the 23d of November, when it was admitted by the appellants' counsel that the Ottoman Bank shares, though standing in the name of Mr. Hodson, were in reality the property of Messrs. Hyam.

November 23.

Mr. Roundell Palmer, Mr. Bovill, and Mr. Roxburgh, for the official manager. — We do not dispute that a *bond fide* out-and-out sale and transfer of these shares would, though made for the sake of escaping liability, have been effectual for that purpose, but we say that this transaction was a mere pretence without any element of *bona fides*, a mere device to enable Messrs. Hyam to escape from liability by appearing not to be shareholders.

Mr. Southgate, for the creditors' representative.

Mr. Selwyn, in reply. — The case merely comes to this, that Messrs. Hyam, having a right to do any thing they pleased with the shares in a direct way, have adopted an indirect one. That
 * 78 the * Ottoman Bank shares belonged to Messrs. Hyam, and that these Mexican shares were therefore in fact purchased by Hodson with Messrs. Hyam's own money, makes him a trustee for them; but he is not, therefore, any the less the holder of the shares, and the only person liable to contribute in respect of them. On the transfer being made, the connection between Messrs. Hyam and the company ceased; the trust is a matter with which the company has nothing to do.

THE LORD CHANCELLOR. — The only question we have to determine is, whether these two gentlemen ought to remain on the list of contributories of this company. I am of opinion that his Honor the Master of the Rolls did right in refusing to remove them from

that list. According to decisions of this Court, to which I most respectfully bow, if it had been proved that they had parted with all interest in these shares, although it was for the express purpose of getting rid of their liability, and although they knew the shares were of no value, and although they knew that the transferee was a man of straw, they would have been absolved from liability and entitled to have their names removed from the list of contributories.¹ I confess that if those cases had come before me, I should have hesitated before I concurred in the decisions, because I think there might have been a considerable difference drawn between the case of an assignee of a lease assigning the lease to a man of straw, and a shareholder who has become a partner with others, and who has incurred a joint liability with them, assigning his shares at a time when the property has ceased to be of any value, and with the sole object of throwing the liability entirely on his copartners. But I again say, I most respectfully bow to the decisions of this Court. According to those decisions, * it is incumbent upon * 79 a shareholder to prove that he has actually parted with all interest in the shares. That *onus* rests upon him. His Honor the Master of the Rolls was not satisfied with the evidence produced before him to show that the appellants in this case had actually parted with their interest. I think that the evidence now before us clearly demonstrates that they have not parted with their interest; that it was a mere fable they were acting; that they intended all that passed to have no operation whatever as between themselves and the pretended transferee.² The questions that have been suggested about whether the liability to be placed on the list of contributories rests upon a trustee or upon his *cestui que trust* do not arise here, for the relation of *cestui que trust* and trustee was never established between these parties. It was a mere fable they were acting, not intended to have any real operation; and it is quite clear to me that this was a contrivance on the part of these two gentlemen for the purpose of enabling them to get rid of their liability, if there should be liability cast upon them by reason of this being a losing concern, but, if by some unforeseen possibility an advantage should arise, to claim the benefit that might be claimed from their still being actually share-

¹ See *Ex parte Parker*, L. R. 2 Ch. Ap. 685; *Weston's Case*, L. R. 6 Eq. 238; S. C., L. R. 4 Ch. Ap. 20.

² See *Bradley v. Hale*, 8 Allen, 59; *Cox v. Jackson*, 6 Allen, 108.

holders in the company. The whole examination proves that. Had they put their defence in this shape, that the transfer was a transfer to a man of straw, and that they knew it to be so, it would have had a much better chance of success than in the shape it has assumed, the fictitious shape of an ordinary commercial transaction, — a sale of what was valuable, and was understood to be valuable both by the transferors and the transferee. The false colour given to the transaction is conclusive to my mind to show that it was a mere sham, and was not intended to have any actual operation ;¹ therefore I consider that these two gentlemen are to be adjudged as still shareholders in this company, and that they

* 80 were *properly placed on the list of contributories. As to the extent of their liability as contributories, or their privileges as contributories, we are not at all called upon to give an opinion.

THE LORD JUSTICE KNIGHT BRUCE. — The transaction in question is clearly one of fraud and simulation. Without seeing at present any reason for dissenting from either of the decisions of the Lords Justices, to which allusion has been particularly made in the argument, I think the order of the Master of the Rolls right. I do not consider that it prejudices, or that our order will prejudice, any right that *Mr. Selwyn's* clients may have to apply in respect of the call for debts or otherwise.

THE LORD JUSTICE TURNER. — The Messrs. Hyam were undoubtedly the owners of the shares up to the 10th of November. The question is, whether they have discharged themselves from that ownership. I do not mean to intimate now any doubt upon the question, whether they could have discharged themselves from that ownership, by making an out-and-out transfer of the shares. The opinion of my learned brother and myself has been already given on that point, and I do not, as at present advised, entertain any doubt upon the matter. But that they could make a mere nominal transfer of the shares, in trust for themselves, I beg leave altogether to dispute. The sole argument in the present case is, that Hodson was to be a trustee for the Hyams ; but that is a trust which, upon the facts of this case, if created at all, was created for the fraudulent purpose of covering the real ownership, and is not a

¹ See *Bradley v. Hale*, 8 Allen, 59 ; *Cox v. Jackson*, 6 Allen, 108.

trust which this Court could in any way recognize or act upon. It is said that they might have assigned to a beggar. I assume * that they might; but I very much doubt, subject to any * 81 further argument which could be advanced upon this subject, whether they could create a beggar a trustee for themselves, as between them and the other partners in this concern. It is clear that the intent in the present case was to cover the real ownership by the creation of a fraudulent trust. I am of opinion that the decision of the Master of the Rolls is in all respects right; and this appeal must be dismissed, and, as I think, be dismissed with costs, including those of the creditors' representative.

PENDLETON v. ROOTH.

1859. November 21, 22, 23, 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A mortgagee in fee, who had been in possession for more than twenty years, died in 1805, leaving a will, by which he devised the property to S. R., his eldest son in tail, with divers remainders over, and appointed him his executor and residuary legatee. In 1812, the persons claiming under the will of the mortgagor filed a bill against S. R. to redeem, and the suit was compromised in 1814 on the terms of S. R. paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will. *Held*, that his heir-at-law was entitled to the equitable fee, and that the remainder-men under his father's will had no title in equity.¹

THIS was an appeal by the defendants from a decree of Vice-Chancellor STUART, proceeding on the ground that a purchase of an equity of redemption by a person who was tenant in tail under the will of the mortgagee, and also residuary legatee and executor, excluded the operation of the Statute of Limitations, so as to give the purchaser an equitable fee, though the mortgagee had been in possession more than twenty years without acknowledgment.

* Samuel Rooth the elder, on the 13th of April, 1776, was * 82 seised of one undivided third part in certain real estate at Newmarket, in the county of Derby. At the same time John

¹ See 2 Story Eq. Jur., § 1521 b, note (7).

Barker was seised of the remaining two undivided third parts in the same property, subject to a mortgage to Joseph Gregory. By indentures of lease and release, dated the 12th and 13th of April, 1776, between Gregory of the first part, Barker of the second part, and Samuel Rooth the elder of the third part, Barker's two-thirds of the property were conveyed to Samuel Rooth the elder in fee, subject to redemption by John Barker, his heirs or assigns, on payment of 240*l.* and interest.

John Barker, by his will dated 6th March, 1777, devised his real estate to his widow, with power to sell the same, or so much as should be required to pay debts, and gave the residue and all his personal estate to her during her widowhood; and after her decease or marriage, he devised the residue of his real estate to John Walker and his heirs, on trust to sell the same, and hold the proceeds upon certain trusts for the testator's children.

John Barker died on the 7th of March, 1777, leaving his wife named in his will and five children surviving him.

In 1782, Samuel Rooth the elder brought an action of ejectment against Mrs. Barker, who was in possession of the mortgaged property, and obtained possession, which he retained till his death.

Mrs. Barker married again in 1784.

Samuel Rooth the elder, by his will dated the 18th of April, * 83 1805, devised the entirety of the Newmarket estate * to

Samuel Rooth the younger, his heirs and assigns, describing it as "all those my messuages, cottages, houses, lands, tenements, hereditaments, and premises, with the appurtenances thereunto belonging, situate, standing, lying, and being at Newmarket aforesaid, and now in my occupation," subject to the payment thereof by his said son of a legacy of 1000*l.* to the testator's daughter Elizabeth, and an annuity to his wife Elizabeth; and the testator further gave and bequeathed to Samuel Rooth the younger certain other hereditaments, situated respectively at Henmoor, Ainmoor, and near to Clay Cross, therein described, and all the residue of his personal estate and effects; and the will then directed that all his debts and funeral expenses should be paid by his son Samuel, and then proceeded as follows:—

"But if my said son Samuel Rooth happen to die without heirs, then I give, devise, and bequeath the said houses, lands, tene-

ments, and hereditaments, and premises, with the appurtenances thereunto belonging, situated, standing, and being at Newmarket, Henmoor, Ainmoor, and near to Clay Cross as before mentioned, unto my son Jeremiah Rooth, his heirs and assigns for ever, he paying unto each of his two sisters Mary and Elizabeth the sum of 250*l.* each of good and lawful money of Great Britain ; but if either or both of them my said daughters happen to be dead, leaving a lawful child behind them, then the said child or children shall represent their respective parents, and receive their respective shares. And I further will and order, that he shall pay the before-mentioned annuity or rent-charge unto his mother, my wife, Elizabeth Rooth, during the term of her natural life, as aforesaid ; and also all my just debts, legacies, funeral expenses as before charged on the said estates. But if it so happen that both my sons die without heirs, then I give, devise, and bequeath all my real and personal estates, * of what nature or kind soever, or * 84 wheresoever, unto my two daughters Mary and Elizabeth, their heirs or assigns for ever, share and share alike, subject to the said annuity or rent-charge of 30*l.* during the life of my said wife."

The testator appointed Samuel Rooth the younger and his widow executor and executrix of his will. Samuel Rooth the elder died on the 27th of April, 1805, and his will was proved by his widow and Samuel Rooth the younger. The will did not contain any bequest of the mortgage debt, nor in any way treat the mortgaged estate as subject to redemption. On the testator's death, Samuel Rooth the younger entered into possession of the estate, and paid the debts, funeral expenses, and legacies, and remained in possession until the execution of the indenture next to be stated.

In 1812, the persons entitled under the will of John Barker instituted proceedings for redemption of his two-thirds. These proceedings ended in a compromise, which was completed by indentures of lease and release, dated the 28th and 29th of January, 1814. The release recited the mortgage to Gregory, the transfer and further charge to Samuel Rooth the elder, the will of Barker, the recovery in ejectment by Samuel Rooth the elder, and his will, so far as regarded the appointment of executors (but without noticing any of the devises contained in it), his death, and the subsequent possession of the property by Samuel Rooth the

younger down to that time. The deed, then, without noticing the proceedings for redemption, or stating whether any thing was done on the mortgage, or referring in any way to the question whether any equity of redemption was subsisting or not, or stating any circumstances bearing upon that question, beyond the facts

above mentioned, proceeded to recite that the parties claim-
* 85 ing under Barker's will had contracted and agreed * with

Samuel Rooth the younger for the absolute sale to him "of their, each and every of their estates, right, title, interest, right and equity of redemption, claim and demand of, in, and to" the property comprised in the mortgage of 1776, for the price of 264*l*. 5*s*. Then, in consideration of that sum paid to their trustee by Samuel Rooth the younger, "in full for the absolute purchase of the hereditaments hereinafter mentioned, and intended to be hereby conveyed and released, and of the inheritance and equity of redemption thereof, free from incumbrances," the parties entitled under Barker's will, "according to their several and respective estates, rights, and interests in the premises," conveyed the property comprised in the mortgage unto and to the use of Samuel Rooth the younger in fee, "freed and absolutely discharged of and from the proviso or condition for redemption of the said hereditaments and premises, or any part thereof, contained in the said in part recited indentures of release or mortgage of the 13th of April, 1776, and all other provisos or conditions for redemption of the same."

Elizabeth Rooth, the testator's widow, died on the 16th of February, 1828, and Samuel Rooth the younger died on the 16th of March, 1829, intestate, leaving Jeremiah Rooth his heir-at-law, who was also a devisee in remainder under the will of Samuel Rooth the elder. Jeremiah Rooth entered into possession, and paid the two sums of 250*l*. given by the will to his sisters Mary and Elizabeth, and died without issue on the 24th of April, 1845, leaving a will by which he devised the estates to the plaintiffs. Under the will of Jeremiah, the plaintiffs entered into and remained in possession. Elizabeth and Mary Rooth afterwards died, and on the 20th of January, 1858, the defendants Samuel Rooth and others, who were their devisees, commenced an action in eject-

ment against the plaintiffs, to recover possession of the prem-
* 86 ises * under the devise in the will of Samuel Rooth the elder to Elizabeth and Mary Rooth. The plaintiffs thereupon filed this bill, alleging that as to two undivided third parts

of the property the testator, Samuel Rooth the elder, was in equity entitled only to the moneys secured by the indentures of the 12th and 13th of April, 1776, and that under his will the interest in those moneys passed to Samuel Rooth the younger as his absolute property ; but that even if the said equitable right to redeem could not be claimed at the testator's death, or until the indentures of the 28th and 29th of January, 1814, still by virtue of such indentures the equity of redemption was revived ; and that, at all events, by virtue of those indentures, the said two-thirds of the estates became vested in Samuel Rooth the younger, for an equitable estate in fee-simple, and were in no wise subject to the limitations contained in the will of Samuel Rooth the elder, but on the death of Samuel Rooth the younger descended to Jeremiah Rooth, and passed by his will.

The bill prayed that it might be declared that the plaintiffs were entitled to the equitable fee-simple of two undivided third parts of the said hereditaments and premises, according to the interests given by the will of Jeremiah, and also prayed for a partition and injunction. Vice-Chancellor STUART made a decree accordingly, and the defendants appealed.

Mr. Bacon and *Mr. Hislop Clarke*, for the plaintiffs, in support of the decree. — The acknowledgment of a tenant in tail will bind the inheritance. *Reynoldson v. Perkins.* (a) Payment of interest by a tenant for life has been held to keep a debt * alive as against the inheritance. *Roddam v. Morley.* (b) * 87 The principle in each case is the same, that there is a recognition of title made by a person against his own interest. *Harrison v. Hollins* (c) shows that the acts of a person having only a limited interest may bind a remainder-man. The Court is disposed to lay hold of slight circumstances to keep alive a right to redeem : *Stansfield v. Hobson* ; (d) and this case could only be decided against us on the ground of want of capacity in Samuel Rooth the younger to make a binding acknowledgment. As, however, he made an admission against his interest, it must be inferred that there had been a previous acknowledgment by the testator, and that Samuel Rooth the younger knew that the right to redeem was

(a) Ambl. 564.

(c) 1 Sim. & Stu. 471.

(b) 1 De G. & J. 1.

(d) 3 De G., M. & G. 620.

not gone at the testator's death. *Cowne v. Douglas* (a) supports the view that even apart from any acknowledgment it was not gone. Moreover, the mortgagee was a tenant in common, and his possession would not defeat other tenants in common.

Mr. Walker and Mr. Chapman Barber, for the appellants. — We contend, first, that the right to redeem was barred before 1814. It is true that before the recent Statute of Limitations a remainderman did not lose his right to redeem during the continuance of a tenancy for life of the equity of redemption; the statute introduced a different rule, because a remainderman might bring a bill to redeem during the continuance of a tenancy for life. *Raffety v. King*. (b) Here, however, the widow's estate under the will of the mortgagor ceased on her marriage in 1784; the youngest child must have attained twenty-one at the latest in 1798, so that * 88 even if the *cestuis que trust* were * not barred by the time having run against the trustee, which we submit they would be, they would at all events be barred long before the transaction of 1814. It is not necessary that the right of redemption should be gone at the time the mortgagee's will was made. *Noyes v. Mordaunt*, (c) *Drant v. Vause*, (d) *Garrett v. Evers*. (e) The rule as to tenants in common would not apply, for the mortgagee had the whole legal estate.

Secondly, we say that if the right to redeem was barred by 1814, nothing has been done which could revive it. Samuel Rooth the younger and Jeremiah Rooth were only tenants in tail, and a tenant in tail without a disentailing assurance can no more bind the inheritance than a tenant for life can. Samuel's character of executor is immaterial. *Smith v. Smith*, (g) *Gregson v. Hindley*. (h) Samuel Rooth the younger stood in a fiduciary position towards the other persons claiming under his father's will, and cannot be allowed to set up against them any title which he acquired by his purchase.

Mr. Bacon, in reply.

Judgment reserved.

(a) M'Clel. & Y. 321.

(b) 1 Keen, 601.

(c) 2 Vern. 583.

(d) 1 Y. & C. C. C. 580.

(e) Mos. 364.

(g) 2 Vern. 92.

(h) 10 Jur. 383, V. C. E.

November 25.

THE LORD CHANCELLOR. — I am of opinion with the Vice-Chancellor, that the respondents are entitled to the equitable fee-simple in two-thirds of the lands in question. When Samuel Rooth the elder had, as mortgagee in fee, been in possession for * twenty years without any sort of acknowledgment of the * 89 existence of the equity of redemption, he was not liable to a suit by the mortgagor to redeem. But the presumption that he was beneficially entitled to the fee-simple might have been rebutted at any time during his life, after the lapse of twenty years, by his acknowledgment that he held as mortgagee, and that he was accountable to the mortgagor.¹ It is admitted that, irrespective of the limitations in his will by which the mortgaged premises were devised to his son Samuel in tail, remainder to his son Jeremiah in tail, remainder to his daughters in fee, an acknowledgment at any time after his death by Samuel the son, while in possession, he being heir-at-law, executor and residuary legatee, would have had the same effect to let in the equity of redemption. Nay, it was hardly contended, that as against Samuel the son himself the devise to him of the estate tail, with remainders over, would have been sufficient to have barred the right to redeem of those claiming under Barker the mortgagor; although it was strenuously denied that this acknowledgment could have prejudiced the rights of those in remainder after his estate tail was spent. But I do not see how the limitations of the estates tail, with the remainder over in fee could, after the acknowledgment by Samuel the son of the existence of the mortgage, prejudice the right to redeem of those claiming under the mortgagor. By the deed of 1841, to which Samuel the son was a party, and under which, although he had not executed it, he acted by taking a conveyance of the equity of redemption and paying the purchase-money for it, a true history is given of the deeds affecting the premises, and a true exposition is given of the state of the title when the deed of 1814 was executed, showing that Samuel the son had no interest beneficially except under the mortgage, and that the equity of redemption still subsisted in those who claimed under Barker the mortgagor.

* *Mr. Walker*, in his learned and ingenious argument, * 90

¹ See 4 Kent, 189, 190; *Morgan v. Morgan*, 10 Geo. 297; *Lawrence v. Fletcher*, 8 Met. 153; S. C., 10 Met. 344.

reasoned as if Samuel Rooth the son had actually been tenant in tail, with remainder over, and had in himself no other title. It is not necessary for us to consider what would have been the effect of such reasoning if Samuel Rooth the younger had been a mere stranger, to whom Samuel Rooth the elder, after being more than twenty years in possession as mortgagee, had devised the mortgaged lands, and the devisee had entered and taken possession as tenant in tail, and then had acknowledged the existence of the equity of redemption and the right of the mortgagor to redeem. Samuel Rooth the younger was heir-at-law of the mortgagee, and was executor and residuary legatee of the mortgagee, and it was admitted that from the time of his father's death he had never acted as tenant in tail or done any thing inconsistent with the supposition that he still held under the mortgage. I think, therefore, that the same effect is to be given to his acknowledgment as if he had held only under the mortgage, and his father's will had not contained the limitations by which an estate tail was given to him with remainders over. The consequence is, that effect must be given to the conveyance of the equity of redemption to Samuel Rooth the son, under which the respondents claim, and that no effect is to be given to the limitation in the will of Samuel Rooth the elder relied upon by the appellants, by which the testator professed to give a remainder in fee to his daughters after the successive estates tail limited to his son Samuel and his son Jeremiah. I therefore think that this appeal should be dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — The first question here I think is, whether, although the conveyance of 1814 does not appear to have been executed by Samuel Rooth the younger * 91 mentioned in * it as a party to it, he ought, upon the materials before us, to be taken to have been privy to it, to have paid the consideration money mentioned in it as paid by him, and to have accepted under it the interest which it purported to confer on him. That question must, I conceive, be answered in the affirmative, and the present case must, in my opinion, stand on the same footing as it would have done and be dealt with as it would have been if he had actually been in the year 1814 an executing party to the deed of the 29th of January of that year. Then comes the question whether on the facts in evidence, including, I agree, the possession by Samuel Rooth the elder at the time of

his death, in 1805, and for more than twenty years next before that event, of the two-thirds in dispute, and the possession also of the same two-thirds by Samuel Rooth the younger, until his death in 1829, from the death of his father, and the will likewise of Samuel Rooth the elder (under which, however, all that Samuel Rooth the younger took, he took either as tenant in tail or absolutely), but including also the conveyance of 1814, it ought to be considered, that immediately before the conveyance of 1814 the mortgage, which in the year 1776 was made to Samuel Rooth the elder, was redeemable. And that question also, I am of opinion, ought to be answered in the affirmative. The materials here appear to me to establish the proposition, that the right of John Barker while living, and after his death of the claimants under his will, to redeem the mortgage of 1776 was not before the year 1814, and not previously to the conveyance made in that year, released or extinguished.

If these views are correct, then, I apprehend that the two-thirds of the Newmarket property, which were mortgaged in 1776 to Samuel Rooth the elder, are not in equity bound as real estate by his will, but became in equity the absolute property of Samuel Rooth the younger, *subject possibly, however, to *92 the unsatisfied demands, if any, to which the elder Samuel Rooth's personal estate was subject.

The transaction of 1814 appears to me to have consisted in effect of two parts: one the redemption of the two-thirds mortgaged in 1776—the redemption of them, namely, by those who representing John Barker the mortgagor were entitled to redeem them; the other a purchase by Samuel Rooth the younger, for a pecuniary consideration, from the persons redeeming of the equitable fee-simple of the redeemed property, which purchase he was clearly against all the other devisees of his father's real estate, as devisees of that testator's real estate, entitled to make and did make for the sole and absolute benefit of himself, Samuel Rooth the younger. He owed not one of them in that character any duty forbidding the transaction. But it is only as representing the sisters of Samuel Rooth the younger in the character of the ultimate devisees in fee of his father's real estate in remainder, expectant on the failure of the estates tail given by the will to Samuel Rooth the younger and Jeremiah Rooth, that the defendants claim the two-thirds which were mortgaged in 1776 or any interest in them. The

decree therefore appears to me to be right as to those two-thirds. It is perhaps superfluous to add, that considering as I do the beneficial interest of Samuel Rooth the elder in the two-thirds at his death as then having had the character and been in the condition of personalty, I must also consider that his will gave that interest, either specifically or otherwise, to his son Samuel absolutely. With regard to the other third, as to which an undertaking to give the defendants possession, if not already given, was entered into on a former day by the plaintiffs' counsel, there is now no dispute.

* 93 *THE LORD JUSTICE TURNER. — As I have not heard the whole of the arguments in this case, I do not think it right to give my opinion upon it.

MONTEFIORE v. GUEDALLA.

1859. November 8, 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A bequest of a share of residue for the benefit of the testator's son and his family may be adeemed wholly or partially by a subsequent advance, by way of settlement, on the son's marriage, and such a settlement may, having regard to the provisions of the will, so operate, rather than as an ademption of an absolute pecuniary legacy.¹

¹ The subject of ademption and satisfaction is discussed with much fulness in 2 Lead. Cas. in Eq. [321] 566 *et seq.*, notes to Chancey's Case. See also 2 Story Eq. Jur. §§ 1100-1118; 1 Jarman Wills (4th Am. ed.), 185, note (1); Miner v. Atherton, 35 Penn. St. 528; Earl of Durham v. Wharton, 3 Cl. & Fin. (Am. ed.) 146, note (1); Dawson v. Dawson, L. R. 4 Eq. 504; Coventry v. Chichester, L. R. 2 H. L. 71, 76; 2 De G., J. & S. 336; 2 H. & M. 149; Nevin v. Drysdale, L. R. 4 Eq. 517; Sims v. Sims, 2 Stockt. Ch. 158; Roberts v. Weatherford, 10 Ala. 72; Zeiter v. Zeiter, 4 Watts, 212; Jones v. Mason, 5 Rand. 577; Gill's Estate, 1 Parsons Eq. Cas. 130; Richards v. Humphreys, 15 Pick. 133.

Where a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended legatee or beneficiary with the money for that purpose, this legacy is satisfied. Hine v. Hine, 39 Barb. 507. See Hauberger v. Root, 5 Barr, 113.

JUDAH GUEDALLA, the testator in this cause, by his will, bearing date the 29th of December, 1889, amongst other legacies, bequeathed to his son Haim Guedalla 3000*l.* sterling, to his son Moses Guedalla 3000*l.* sterling, and to his daughter Grace Guedalla 3000*l.* sterling, to be paid to them respectively within three calendar months after his decease, subject to the conditions thereinafter declared; and, after noticing that his son Haim had already received of him 3000*l.* sterling, and that his son Moses had already received of him 1500*l.* sterling, and that upon his marriage he had made a settlement of 2000*l.* three and a half per cents, which together he considered as equal to 3500*l.*, directed that, in calculating his residuary property, his said son Haim should bring 3000*l.* and his said son Moses should bring 3500*l.* into hotchpot; and as to all his residuary property, bequeathed the same to trustees upon trust as to one-third part thereof (his said son Haim bringing the said 3000*l.* which he had already received of him into hotchpot), to permit his said son Haim to receive the income of the said third part until he should assign, charge or otherwise dispose of the same by way of anticipation, or should * do or suffer * 94 to be done any act whereby the same, if payable to himself, would become vested in some other person or persons; and, if his said son Haim should dispose of the said income by way of anticipation, or should do or suffer to be done any such act as aforesaid, then, during the remainder of the life of his said son Haim, to pay and apply the said income for the maintenance or otherwise for the benefit of all or any one or more, exclusively of the others or other, of them his said son Haim and the person or persons who, under the trusts of that his will, would be entitled thereto in case his said son Haim were then actually dead, as the trustees, in their uncontrolled discretion, should think fit, and in such manner as to them should seem meet; and, after the actual decease of his said son Haim, upon trust for his children and issue as he should by will appoint; and, in default of such appointment, in trust for his children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age with the consent of their parents or guardians: any child, in whose favour an appointment should be made, bringing the appointed share into hotchpot, unless the contrary should be directed by the appointment; and in case there should be no child of his said son Haim in whom the said third part of his residuary estate should become abso-

lutely vested, the testator directed that, after the decease of his said son Haim and such failure of his issue as aforesaid, the said third part of his residuary estate should remain and be in trust for the person or persons who, under the statutes for the distribution of the estates of intestates would then be entitled thereto, in case his said son Haim had died possessed thereof unmarried and intestate; and to be divided between or amongst such persons, if more than one, in the shares and proportions in which the same would be divisible by virtue of the same statutes. The testator then

* 95 proceeded to dispose of the other two-thirds * of his residuary estate. As to one of such thirds (his said son Moses bringing the said 1500*l.* which he had already received of him, and 2000*l.* for what he had settled on his marriage, making together 3500*l.*, into hotchpot), upon the like trusts for the benefit of Moses and his children and issue and next of kin as had been declared of Haim's third, except that a life interest was given to the wife of Moses immediately after his decease. And as to the other third (his said sons having previously brought the said two several sums of 3000*l.* and 3500*l.* into hotchpot), upon trusts in favour of his daughter Grace Guedalla and her children and issue and next of kin, also similar to those declared of Haim's third. There was also contained in the will the usual provision for the maintenance of the children of the tenants for life out of the interest of their respective shares.

After the date of the will, the testator's son Haim intermarried with Jemima Sebag, and, by the settlement made upon the marriage, to which the testator was a party, reciting that, upon the treaty for the marriage, it was agreed that the testator should, as the portion of the said Haim Guedalla his son, transfer into the names of the trustees of the settlement the sum of 2000*l.* new three and a half per cent bank annuities, and that the said bank annuities and certain property of the wife should be settled upon the trusts thereafter mentioned, and also reciting the transfer to the trustees of the bank annuities and other property, the trusts were declared to be, as to the 2000*l.* new three and a half per cent bank annuities, for Haim Guedalla, and as to the other property for Jemima Sebag until the marriage; and, after the marriage, as to the bank annuities and all the other property, to pay the income to the wife for her life for her separate use, without power of anticipation; and, after her decease, to Haim Guedalla for his

life; and after the decease * of the survivor, as to the cap- * 96
ital and future income, in trust for the children of the marriage who, being sons, should attain twenty-one, or being daughters should attain that age or marry with the consent of parents or guardians, with powers to the trustees to make advancements for the children to the extent of a moiety of their shares, and to apply the income of their shares for their maintenance; and in case there should be no child of the marriage in whom the trust funds should become absolutely vested, the trusts were declared to be, as to the 2000*l.* new three and a half per cent bank annuities, for the appointees by will of the said Haim Guedalla, and in default of appointment for his next of kin, as if he had died possessed thereof unmarried and intestate; and as to the other property, in trust in like manner for the appointees and next of kin of Jemima Sebag.

The testator died after the date of the settlement made on his son Haim's marriage, and in a suit subsequently instituted at the Rolls for the administration of his estate, his residuary property was certified by the chief clerk to consist of personalty of very considerable amount, and of two freehold houses at Amsterdam.

It was admitted by all parties to the suit, that either the legacy of 3000*l.* to Haim Guedalla, or the one-third of the residue given by the will upon trusts for the benefit of him and his children, issue and next of kin, had been satisfied or adeemed *pro tanto* by the settlement of the 2000*l.* new three and a half per cent bank annuities; but on the cause coming on for further consideration before the Master of the Rolls, the question was raised on the part of Haim Guedalla on which of those two funds the ademption operated.

This question was now submitted, by the desire of the * Master of the Rolls, for the determination of the Court of * 97
appeal in the first instance.

Mr. Jessel, for Haim Guedalla. — It being admitted that the advance of 2000*l.* three and a half per cent bank annuities made by the testator upon the marriage of his son Haim is an ademption *pro tanto* of Haim's interest under the testator's will, that ademption operates upon the share of residue given for the benefit of Haim, his children, issue and next of kin, and not upon the legacy given to him absolutely. It was formerly supposed that there could be neither satisfaction of a portion by a gift of residue, nor ademption

of a residue by reason of the indefiniteness of the amount of a gift of residue. *Farnham v. Phillips*, (a) *Freemantle v. Bankes*, (b) *Watson v. The Earl of Lincoln*. (c) That doctrine has, however, since been repudiated, as regards the question of satisfaction in *Lady Edward Thynne v. The Earl of Glengall*, (d) where it was decided that the bequest of a residue will, according to its amount, be a satisfaction of a portion, either in full or *pro tanto*. That being so, it is impossible, upon sound principle, to avoid the inference that a portion by settlement or otherwise is, in like manner, a satisfaction of a previous bequest of residue. The rule as to satisfaction of portions by legacies, and that as to ademption of legacies, both rest upon the same foundation; viz., the leaning of Courts of Equity against double portions: and it is submitted that a gift of residue, or of part of a residue, is a portion within the meaning of one rule as well as of the other. It was in fact so assumed

* 98 in *Pym v. Lockyer*. (e) Assuming, * therefore, that a gift of residue, or of part of a residue, is capable of ademption, it is submitted that the present is a case in which the rule should be applied. The scheme of the will throughout raises a presumption of intention on the part of the testator to distribute his property equally amongst his three children, and that scheme will be more nearly carried out by ademption *pro tanto* of the share of residue than by ademption *pro tanto* of the legacy. The difference between the trusts of the marriage settlement of Haim, and those of the gift of the share of residue in which he is interested, is not sufficiently wide to prevent the application of the rule. *The Earl of Durham v. Wharton*. (g) If, however, it should be thought that there is no reason why one fund should be adeemed rather than the other, then it is submitted that the ademption must be apportioned between them according to their relative amounts.

Mr. J. Waley, for the executor and the infant children of *Moses Guedalla*. — In *Freemantle v. Bankes*, (b) it was held that a gift of residue was not a portion liable to be adeemed by a subsequent advance by the testator, and if such be the law, it follows that the pecuniary legacy to Haim must alone bear the whole diminution. Upon that point the authority of *Freemantle v. Bankes*

(a) 2 Atk. 215.

(b) 5 Ves. 79.

(c) Ambler, 325.

(d) 2 H. L. Cas. 181.

(e) 5 Myl. & Cr. 29.

(g) 3 Cl. & Fin. 146; 10 Bligh, 526.

has not been affected by any subsequent decision. Although upon the question of satisfaction *pro tanto* of a portion by a gift of residue, it has been overruled by *Lady Edward Thynne v. Earl of Glengall*, (a) yet, inasmuch as it was left untouched and unmodified upon the question first mentioned, it must still be regarded as the ruling authority upon that point. To * overrule it in * 99 this respect is the province not of this Court, but of a higher tribunal.

Mr. Eddis, for the testator's daughter Grace, and *Mr. W. P. Murray*, for the testator's son Moses, submitted the question for the decision of the Court, being indifferent upon which fund the ademption should be held to operate.

Mr. Jessel, in reply, contended that, inasmuch as the question of ademption of residue by a portion, and that of the satisfaction of a portion by a gift of residue, rested in principle upon the same foundation, the effect of the decision in *Lady Edward Thynne v. Lord Glengall* was to overrule *Freemantle v. Bankes* upon the former point, as well as upon the latter. He referred also to *Kirk v. Eddowes*. (b)

Judgment reserved.

November 25.

THE LORD CHANCELLOR. — In this case the facts are not at all in dispute; and the first question of law to be considered is, whether, if there had been no legacy of specific amount given by the will to the testator's son Haim, the settlement of 2000*l.* three and a half per cents on Haim's marriage, subsequent to the will, would have been an ademption *pro tanto* of the one-third of the residue bequeathed to him. On this I have been unable to entertain the smallest doubt.

It has been said that neither can there be an ademption where a testamentary gift is of the residue of the testator's personal property, nor can such testamentary gift operate as a satisfaction of a covenant to make a provision to a given amount for a child. This position rests * on no principle, and, if strictly acted * 100 upon, would produce great injustice. The doctrine of ademption has been established for the purpose of carrying into effect the

(a) 2 H. L. Cas. 131.

(b) 3 Hare, 509.

intention of fathers of families in providing for their children, and of preventing particular children from obtaining double portions contrary to such intention. The only reason for the exception when the testamentary gift is of a residue is, that a residue is uncertain, and may be worthless. A will may be made under such circumstances, and may be so worded as to show that the testator considered the residue of insignificant value, and there it may be proper to hold that he did not intend that this should be in satisfaction of a covenant to make provision for a child and that he did not intend any subsequent advance to a child to be an ademption of the bequest of the residue. But if a testator, after directing his executors to pay debts, funeral expenses, and legacies, goes on to say, "and whereas, I wish all the residue of my personal property to be equally divided among my three children, I direct that each of them shall receive one-third of the said residue," and afterwards, between the making of his will and his death, he advances 5000*l.* to a daughter on her marriage, or to a son to purchase a commission in the army, can there be any doubt that he meant this sum to be deducted from the one-third of the residue coming to the daughter or the son?

While it was strangely supposed that there could not be ademption *pro tanto*, there might be some colour for giving weight to the argument arising from the alleged uncertainty of the amount of a residue. But after the decision of *Pym v. Lockyer*, (a) establishing that there may be ademption *pro tanto*,¹ the cases relied upon to show that there is a distinction on this subject between a bequest of a specific amount and the bequest of a residue, are left *101 without any reasonable support. While some of *these cases may perhaps be explained away, there are others, such as *Farnham v. Phillips*, (b) before Lord HARDWICKE, and *Freemantle v. Bankes*, (c) before Lord LOUGHBOROUGH, which we should have had great difficulty in dealing with, if they had not been questioned in a higher tribunal. But the whole of that class of cases must be considered as swept away by the decision of the House of Lords in *Lady Edward Thynne v. The Earl of Glen-gall*. (d) That case arose upon the effect of a bequest as satisfac-

(a) 5 Myl. & Cr. 29.

(c) 5 Ves. 79.

(b) 2 Atk. 215.

(d) 2 H. L. Cas. 131.

¹ See *Miner v. Atherton*, 35 Penn. St. 528; *Gill's Estate*, 1 Parsons Eq. Cas. 189; 2 Story Eq. Jur. §§ 1111, 1112, and note.

tion of a prior covenant to make provision for a child; but it is admitted that satisfaction by a residue and ademption of a residue for this purpose cannot be distinguished. The facts of that case show, in a very striking manner, how injustice would have been done to one of the daughters of the testator, and how his intention that there should be an equal distribution of his property between his daughters, would have been defeated if the rule contended for had been adhered to.¹

As there clearly may be ademption of a residue, if in this will there had been no gift to Haim of a legacy of 3000*l.*, there must have been an ademption to the amount of the 2000*l.* three and a half per cents from his one-third of the residue. By requiring him to bring into hotchpot the 3000*l.* which he had received before the will, and Moses to bring into hotchpot the 3500*l.* which he had received before the will, and directing that each of his three children should take one-third of the residue of his property, the testator clearly expresses his intention that, regard being had to what they received during his life, or should receive at his death, they should all three share alike. The trust respecting the 2000*l.* three and a half per cents advanced on Haim's marriage are not exactly the same as the trusts respecting his one-third of the residue, but they do not by any means vary so far as to prevent the ademption. In giving a life interest in this sum * to * 102 Haim's wife, nothing more was done than he might have been expected to be willing to do if he had not married till after his father's death. Nor can any injury be considered as inflicted on the children of Haim by allowing the ademption, which is only *pro tanto*: so that under the marriage settlement, and under the will, the children are as well provided for as if the 2000*l.* three and a half per cents had never been advanced.

There remains the question, whether the ademption shall be from the residue, or from the legacy of 3000*l.*? Instead of ademption, it should more properly be called substitution, or an advance by the testator in his lifetime, instead of payment by his executors.

¹ As to the introduction of parol evidence to control the presumption of ademption, or satisfaction of a legacy, by showing a different intention on the part of the testator, see *Langdon v. Astor*, 16 N. Y. 9; *Rogers v. French*, 19 Geo. 216; *Miner v. Atherton*, 35 Penn. St. 528; *Gill's Estate*, 1 Parsons Eq. Cas. 139; *James v. Mason*, 5 Rand. 577; *Sims v. Sims*, 2 Stockt. Ch. 158.

Then for what shall the advance on Haim's marriage be considered as substituted *pro tanto*? I say that which it most nearly resembles. But the advance and the residue were almost homogeneous, the trusts being substantially the same for the benefit of Haim and his children. On the contrary, the legacy of 3000*l.* was an absolute gift to Haim, which he was to receive for his own exclusive benefit, three months after his father's death. If taken *pro tanto* from the legacy, there would be a difficulty in calculating for how much it should be considered an ademption. Certainly not to the full amount of the value of the stock settled upon him, his wife and children, at his marriage; for this he was entitled to under the settlement for his life only, and that could not be equivalent to a like sum which was absolutely his own.¹

The intention of the testator may be fairly presumed to be that Haim should receive the full amount of the legacy of 3000*l.* for his own benefit, and that the advance on Haim's marriage was part of the provision for him and his children which was contemplated by the residuary bequest. My opinion therefore is,
 * 103 that the * 2000*l.* three and a half per cents should be taken in ademption *pro tanto* of Haim's share of the residue.

THE LORD JUSTICE TURNER. — In order to raise the question which we have had to consider in this case, it was necessary, in the first place, to establish, on the part of Haim Guedalla, that there could be an ademption of a residuary bequest; for unless this point was established, there could be no fund except the legacy of 3000*l.* on which the ademption could operate. The argument, therefore, on the part of Haim Guedalla, was first directed to this point; and it was insisted on his behalf that, whatever doubt might formerly have existed on this point was removed by the case of *Lady Edward Thynne v. The Earl of Glengall*, (a) in which it was held that a gift of residue might operate as a satisfaction of a portion, the argument being that satisfaction and ademption, so far as portions are concerned, stand upon the same footing, — the leaning of this Court against double portions. That this Court

(a) 2 H. L. Cas. 181.

¹ If the advance and legacy are substantially the same, a small variance in the time of payment, or other trifling difference, will not vary the application of the rule of ademption or satisfaction. *Hine v. Hine*, 39 Barb. 507; see *Dugan v. Hollins*, 4 Md. Ch. 139; 2 Story Eq. Jur. § 1109.

does entertain such a leaning cannot be denied. It is the recognized doctrine of the Court, and has been acted upon from very early times, both in cases of satisfaction and in cases of ademption. The case already referred to is a modern instance of the application of the rule to the case of satisfaction, and *Pym v. Lockyer* (a) of its application to the case of ademption. The principle is in both cases the same, — that the Court will not impute to a parent the intention twice to discharge the same obligation of providing for his child, — a rule founded, as it seems to me, on very sufficient reasons; for there can be no doubt that, in the absence of it, the affairs of families would in many cases be involved in the utmost confusion.

* Seeing, then, that the cases of satisfaction and ademp- * 104
tion rest upon the same principle, we are bound, I think, to apply to the case of ademption the rule laid down in the House of Lords with reference to the case of satisfaction; and I am not the less willing to do so from finding that the cases in this Court on the subject of a residuary gift operating an ademption or satisfaction of a portion do not appear to me to be very decisive, and do not, as I think, establish that a gift of residue can in no case operate satisfaction or ademption. Lord ROSSLYN indeed, in *Freemantle v. Bankes*, (b) has intimated an opinion that a gift of residue cannot have such an operation, as Lord HARDWICKE has also done in *Farnham v. Phillips*; (c) but the case of *Freemantle v. Bankes* was heard as a short cause, and it may be collected from the judgment that the question in that case was of little value, and did not undergo full consideration; and in *Farnham v. Phillips* there were other circumstances which probably had weight in the decision. The latter case, indeed, can hardly be considered as of much authority upon the point, for we find Lord HARDWICKE himself afterwards expressing doubt upon the subject in *Watson v. The Earl of Lincoln*. (d) And in *Rickman v. Morgan*, (e) though the case is distinguishable as having depended upon the covenant, Lord THURLOW certainly considered that a gift of residue was a provision or advancement for a child; and it is, I think, to be gathered from the case of *Bengough v. Walker*, (g) that this was the opinion of Sir WILLIAM GRANT also.

(a) 5 Myl. & Cr. 29.

(d) Amb. 325.

(b) 5 Ves. 79.

(e) 1 Bro. C. C. 63; 2 Bro. C. C. 394.

(c) 2 Atk. 215.

(g) 15 Ves. 507.

Upon the whole, I think, the question whether a gift of residue does or does not operate ademption or satisfaction, must
 * 105 depend upon the intention; and that, although * the uncertainty of the provision may influence the question, it is not decisive upon it.

In this case the intention that the children should share equally seems to me to be very strongly manifested by the will; and, having regard to the cases upon the subject, there is not, I think, so much variance between the provisions of the will and of the settlement as to warrant us in holding that the latter was not intended as a substituted provision.¹

I am of opinion, therefore, that in this case the provision made by the settlement may well be taken to have adeemed *pro tanto* the bequest of the share of the residue; and I may add upon this part of the case that, as to cases of ademption at least, much of the difficulty which formerly existed as to holding a gift of residue to be adeemed by a subsequent provision, seems to me to be removed by the decision in *Pym v. Lockyer*. (a) Until that case was decided, it was considered that, if there was any ademption at all, the ademption must be total; and it might be difficult to suppose that it could be intended by what, perhaps, might be a small provision, to adeem a bequest of residue which might be of large amount. But it is settled by that case that there may be partial ademption, and it does not seem to me that there is the same difficulty in presuming an intention to adeem *pro tanto* as there would be in presuming in favour of a total ademption.

There being then in this case two funds, either of which may be taken to have been adeemed by the settlement, the remaining question is, on which of these funds the ademption is to take effect. In general I should think that such an ademption ought to take
 effect upon the fund given absolutely to the child, rather
 * 106 than upon that * which is constituted a provision for the child by the construction of this Court. But this again seems to me to be a question of presumed intention; and in this case the will appears to me to demonstrate that the children were intended to take their legacies without deducting what was advanced to them, and that the advances were to be set against the shares of

(a) 5 Myl. & Cr. 29.

¹ See *Hine v. Hine*, 39 Barb. 507, cited *ante*, 102, note (1); *Swoope's Appeal*, 27 Penn. St. 58; *Dugan v. Hollins*, 4 Md. Ch. 139.

residue; and this having been the intention manifested by the will, I think we ought rather to presume the continuance than the change of that intention. I think also that this presumption is fortified by the proximate correspondence between the trusts of the settlement and the trusts declared by the will of the share of the residue, and not the less so by the circumstance that there is a deduction from the share of residue given for the benefit of the son Moses and his issue of the amount which had been settled upon his marriage; and my opinion therefore is, that the 2000*l.* new three and a half per cent bank annuities ought, under the circumstances of this case, to be taken in ademption *pro tanto* of the share of the residue, and as the Lord Chancellor is of the same opinion, the decree must be accordingly.

This being a question between co-plaintiffs, (a) in which * the interests of infants are concerned, we have not, I * 107 think, as the record stands, any authority to decide it; and I think therefore a short supplemental bill ought to be filed to set right the record before the order is drawn up.

THE LORD JUSTICE KNIGHT BRUCE. — Independently of the point of practice mentioned by the Lord Justice TURNER I have considerable doubt as to the law of the case. As to the good sense of it, however, I have none. That is in accordance with the two judgments which have been given, and which must of course dispose of the matter.

(a) Upon the record, as it stood when the decree was pronounced by the Master of the Rolls, Haim Guedalla and the executor of the testator, and the infant children of Moses Guedalla, were all named as co-plaintiffs; and the decree pronounced at the Rolls was the ordinary administration decree, which was taken by consent, the above question, at the express request of the Master of the Rolls, being brought before the Court of appeal for decision. The objection, that such a question could not be decided as between co-plaintiffs, was taken by the Court of appeal in the early part of the argument, when an undertaking was given by all parties that the record should be set right in that respect by supplemental suit, and the argument was then allowed to proceed, it being understood that the whole decree was to be considered as the decree of the Court of appeal.

MUGGERIDGE v. STANTON.

1859. November 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

By a post-nuptial settlement a wife settled savings of her separate estate upon trusts for herself and her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five without issue, his share should go to the survivor. There was also a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, and that the sum to be so added should be subject to the like trusts as the original fund. The wife invested in the names of the trustees, but without communicating the fact to them, various sums, arising partly from accumulations of the dividends and partly from funds derived from other sources; and after the death of the husband, and of both of the sons, without issue, the executor of the survivor of the sons, instituted a suit to have the trusts of the settlement executed. *Held*, that it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement: and *held*, that all the additions were subject to the trusts of it; and there not appearing sufficient probability of establishing in a cross suit a case of mistake, the Court refused to give an opportunity to institute such a suit.

THIS was an appeal from the decree of Vice-Chancellor KINDERSLEY, declaring that the whole of certain invested funds were subject to the trusts of a post-nuptial settlement.

* 108 * By an indenture dated the 29th of August, 1816, and made between John Stanton, since deceased, and Sarah Stanton the defendant, then his wife, of the first part, John Toms of the second part, and Samuel Brooke and Henry Hulbert of the third part, all such sums of money as John Stanton in right of his wife Sarah Stanton might become entitled to receive on account of the personal estate and effects of John Toms deceased were assigned to Samuel Brooke and Henry Hulbert, for the separate use of Sarah Stanton for her life, and after her decease, in trust for John Stanton for life, and after the decease of the survivor, in trust for their children as they or the survivor of them should appoint, and in default of appointment, in trust for all the children who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry.

By the indenture in the question in the cause, which was dated the 30th of April, 1836, and made between John Stanton and Sarah Stanton of the one part, and Richard Pugh and William Hicks, of the other part, after reciting the before-stated indenture of the 29th of August, 1816, that the fund subject to the trusts of that indenture then was 5916*l.* 17*s.* 11*d.* 3*l.* per cent consolidated bank annuities; and that John Stanton and Sarah Stanton had issue of their marriage two children only, viz., John Toms Stanton, then aged sixteen years, and William Stanton, then aged thirteen years; and that the defendant Sarah Stanton not having occasion to expend the whole of the interest and dividends arising from such stock, the same had from time to time accumulated, and that there was then in her hands the sum of 2700*l.*, savings from her said interest and dividends as aforesaid; and that for the further and better provision for herself and also for the said John Stanton and her said two children, the defendant Sarah Stanton, being desirous of investing the said sum of 2700*l.*

* in the purchase of government stock, applied to the * 109 defendants Richard Pugh and William Hicks to become trustees of the stock so to be purchased, and which, with the consent of the said John Stanton, they had agreed to do, and to stand possessed thereof upon the trusts thereafter declared; and that the defendants Richard Pugh and William Hicks, at the request of the defendant Sarah Stanton, had, on the day of the date of those presents, laid out and invested the said sum of 2700*l.* in the purchase of 2938*l.* 15*s.* 6*d.* 3*l.* per cent consolidated bank annuities, and that the same was then standing in their names: it was witnessed, that, in pursuance of the said agreement, and in order to make further provision for Sarah Stanton, and after her decease for John Stanton and their said two sons, it was thereby agreed, and particularly Sarah Stanton, with the privity and consent of the said John Stanton, directed and appointed, that Richard Pugh and William Hicks should stand possessed of the 2938*l.* 15*s.* 6*d.* 3*l.* per cent consolidated bank annuities, in trust to pay the interest and dividends to Sarah Stanton for her separate use, and, after her decease, to pay the income to John Stanton, in case he should survive her; and after the decease of the survivor the said stock was to be in trust for the said John Toms Stanton and William Stanton, equally to be divided between them, to and for their own absolute use and benefit, and to be paid and

transferred on their respectively attaining twenty-five years of age. Provided always, and it was thereby declared, that in case either of them the said John Toms Stanton and William Stanton should die before he attained twenty-five years of age without having been married, then and in such case the share of the one so dying should become the property of the survivor and be transferred to him accordingly, with trusts in the events which did not
 * 110 happen of either of them John Toms * Stanton and William Stanton dying leaving a wife or child, or of both dying before they attained twenty-five years of age.

And the deed contained the following proviso : —

“Provided, and it is hereby further covenanted, declared, and agreed by and between the said parties hereto, that in case the said Sarah Stanton or the said John Stanton shall, at any time during their respective lives, be minded and desirous of investing any part of the interest and dividends arising from the said sum of 2938*l.* 15*s.* 6*d.* 3*l.* per cent consols, he or she shall be at perfect liberty so to do, and add the same to the said sum of 2938*l.* 15*s.* 6*d.* 3*l.* per cent consolidated bank annuities ; provided that the total amount to be so invested, including the said sum of 2938*l.* 15*s.* 6*d.* 3*l.* per cent consolidated bank annuities, shall not, for the purpose of fixing the stamp duty to these presents, exceed in the whole the sum of 6900*l.* And it is hereby declared and agreed, that the sum or sums of money, if any, from time to time to be so added to the said stock by the said Sarah Stanton, or by the said John Stanton, and the interest and dividends arising therefrom, shall be subject and liable to the like trusts, and under the same powers, provisos, declarations, and agreements, as are hereinbefore expressed and declared of and concerning the said sum of 2938*l.* 15*s.* 6*d.* 3*l.* per cent consolidated bank annuities, and of and concerning the interest and dividends arising therefrom, and as fully and effectually to all intents and purposes as if invested previous to the execution of these presents, and as if the same had been and formed part and parcel of the original sum invested as aforesaid.”

* 111 Between May, 1837, and May, 1848, the defendant * Sarah Stanton invested in the names of Richard Pugh and William Hicks sums of money amounting in the whole to 3826*l.* 4*s.* 6*d.*, in the purchase of 4136*l.* 4*s.* 6*d.* bank 3*l.* per cent annuities ; and

the bank annuities so purchased were from time to time added to the said sum of 2938*l.* 15*s.* 6*d.* bank 3*l.* per cent annuities, making a total sum of 7075*l.* like annuities. Of the sum of 4136*l.* 4*s.* 6*d.* bank 3*l.* per cent annuities, 1140*l.* 7*s.* 2*d.* arose from the investment of a sum of cash produced solely from the accumulation of the dividends of the 2938*l.* 15*s.* 6*d.* like annuities. The sum of 2995*l.* 17*s.* 4*d.* bank 3*l.* per cent annuities, being the residue of the 4136*l.* 4*s.* 6*d.* like annuities, arose from the investment of a sum of cash which was produced, — partly from the dividends of the above-mentioned sum of 5916*l.* 17*s.* 11*d.* bank 3*l.* per cent annuities, — partly from the investment of the accumulations of the dividends of the annuities ; partly from other portions of the separate estate of Sarah Stanton; and partly, viz. to the extent of 197*l.* 0*s.* 7*d.*, from the investment of the accumulated dividends of the above-mentioned sum of 2938*l.* 15*s.* 6*d.* like annuities.

No separate or distinct account of the last-mentioned investments was ever kept, but such investments were all made by Sarah Stanton in the names of Richard Pugh and William Hicks as the trustees of the indenture of the 30th of April, 1836.

John Stanton, the husband of the defendant Sarah Stanton, died on the 1st of May, 1852.

William Stanton died on the 19th of May, 1854, having by his will appointed John Toms Stanton his sole executor.

* John Toms Stanton died on the 24th June, 1856, having made a will, whereby he appointed the plaintiffs Henry Muggeridge, James Allberry, and Henry Whittall Teesdale executors. * 112

Both William Stanton and John Toms Stanton respectively attained the age of twenty-five years, and died without issue. William Hicks died in 1854, leaving Richard Pugh, his co-trustee, surviving.

The bill in this suit was filed by the executors of the will of John Toms Stanton, against Richard Pugh and Sarah Stanton, and after stating that, in order to administer the estate of their testator, they must dispose of his reversionary interest in the above-mentioned sum of 4136*l.* 4*s.* 6*d.* bank 3*l.* per cent annuities, but by reason of a claim set up by the defendant Sarah Stanton, since the death of their testator, they had been unable to dispose thereof, it prayed that the trusts of the indenture of the 30th of April, 1836, might be executed under the direction of the Court, and the rights

and interests of the plaintiffs and of the defendant Sarah Stanton in the said sum of 7075*l.* bank 3*l.* per cent annuities ascertained and declared.

The defendant Sarah Stanton, by her answer admitted the facts above set forth, but stated that it was her intention and view and wish, when she executed the indenture of settlement of the 30th of April, 1836, that it should provide, and that she understood and believed that it did in fact provide, that in the event of her surviving her husband, and of her sons dying without issue in her lifetime, that the whole of the property therein comprised would be at her own disposal, and that it was by mistake and contrary to

her intention and understanding that the ultimate trusts of
 * 113 the said indenture were different * from what she so understood and believed; and that it was not until she had heard the will of the said John Toms Stanton read, and became aware of his having thereby attempted to dispose of the trust funds subject to the trusts of the said indenture, that her attention was called to the fact of the ultimate trusts of the said indenture of settlement being those in the bill set forth. She insisted that the sums of 1140*l.* 7*s.* 2*d.* 3*l.* per cent bank annuities and 2995*l.* 17*s.* 4*d.* like annuities were not subject and had never been dedicated by her to the trusts of the settlement; but admitted that they had been invested by her as above mentioned without the fact being communicated to any one, and that the dividends on all the above-mentioned investments had been received by her from time to time under a power of attorney, given to her by the trustees of the settlement of the 30th of April, 1836; and that, having received them, she, without any communication either to them or to her husband, through her own solicitor, had invested them *de anno in annum* in the names of the trustees. She submitted that as she was entitled to a life-interest in the said funds, and as no question as to the further destination of such funds would arise until her death, the plaintiffs ought not to have filed their bill for the purpose of having the said question decided during her lifetime. She further submitted that the question raised by the plaintiffs' bill ought not to be decided against her without an opportunity being afforded her of filing a cross-bill for the purpose of having the settlement of the 30th of April, 1836, reformed.

It was shown, in evidence, that the draft of the deed of the 30th of April, 1836, having been prepared by Mr. Hine, the solicitor

of the trustees, was delivered by him through Mr. Pugh to Mrs. Stanton; that she then suggested certain alterations; that the draft was *then returned to Mr. Hine, who, after *114 making the alterations proposed, procured the deed as altered to be engrossed, and through Mr. Pugh handed to her a copy of such engrossment, which had ever since remained in her possession. It was shown also that Mr. Pugh, the trustee, upon the execution of the instrument read it over to her and explained to her its contents.

The cause was heard upon motion for decree, and the Vice-Chancellor having decided that the whole of the additions to the original trust fund were subject to the trusts of the settlement of the 30th of April, 1836, Mrs. Stanton appealed from the whole decree.

Mr. Baily and Mr. Nalder, for the plaintiffs. — The title of the representatives of the deceased sons of Mrs. Stanton is indisputable as to the original sum of 2938*l.* 15*s.* 6*d.* 8*l.* per cent bank annuities, and the sum of 1140*l.* 7*s.* 2*d.* like annuities, being the amount of the accumulations of the dividends of that sum. The trusts of the settlement of the 30th April, 1836, show this, and it is clear from the evidence, that Mrs. Stanton did not misunderstand the deed. Several months elapsed between the return of the draft settlement, with the alterations suggested by herself, and the time when she executed the settlement, during the whole of which she had abundant opportunity of making herself acquainted with its details; and she must be presumed to have done so, though she did not think fit to consult any other solicitor than Mr. Hine in the matter. Her suggestion of the alterations, which were adopted, leads also to the same conclusion. Possibly some part of the details of the deed may have been misapprehended by her; but to allow her, after the settlement has existed for more than twenty years, to say, “the deed is not what I supposed it to be,” would lead to dangerous consequences. *Mrs. Stanton *115 has all along had a copy of the deed in her possession, and she never raised any objection until the death of the survivor of her sons. There is nothing unreasonable in the limitations contained in the settlement, and it is now too late to question its validity. The evidence, moreover, proves that Mrs. Stanton must have been aware of the effect of the limitations; for, by her answer,

she admits that Mr. Pugh read the draft deed over to her, and explained, or endeavoured to explain, its effect to her before she executed it. There can be no doubt, therefore, as to the original fund: nor can there as to that part of the fund subsequently added, which arose from the accumulations of the dividends of the original trust fund; for the deed itself provides not only for the investment of sums so derived, but enables Mr. and Mrs. Stanton to add them to the original fund. The mere addition, therefore, of the accumulated dividends to the original trust estate was tantamount to a declaration of trust thereof for the purposes of the settlement. As to that part of the fund subsequently added to the original trust stock, which was derived from sources unconnected with the settlement, it appears that on every occasion when such an investment was made, it was so in a lump sum, with other funds, of which a trust was expressly declared by the deed. This mode of investment, in the absence of an express declaration to the contrary, is, it is submitted, in effect a dedication of such portion of the added fund to the same trusts as those of the other unsevered portion of such added fund. Under these circumstances the whole of the funds subsequently added to the original trust fund must be taken to be subject to the same trusts as such original fund.

Mr. Toller and Mr. Archibald Smith, for Mrs. Stanton. — * 116 Admitting that Mrs Stanton is bound by the deed of April, 1836, so far as regards the fund originally settled thereby, it is submitted that she is not so as regards the additions subsequently made by her to the settled fund; and particularly as to that part of such additions as did not arise from the accumulations of dividends. The trusts of the deed of April, 1836, are not continuing trusts, and its limitations are of an extremely complicated character. Though these trusts may have been explained to Mrs. Stanton before the execution of the deed, it does not follow that they were present to her mind when she made the subsequent investments. Both she and Mr. Pugh, her trustee, were in an humble position of life, and were hardly competent, the one clearly to explain, and the other to comprehend, and still less to remember, the exact tenor of the trusts of the deed. The answer of Mrs. Stanton avers that she was all along under the impression that, in the event of her surviving her sons, she would have power to

dispose of the settled fund by her will. That being so, no presumption arises, as regards the subsequent accretions, that she intended them to be held by the trustees upon the same trusts as the original fund; and, in order to rebut a resulting trust in favour of the settlor, it is of necessity that there should be such a presumption. *Cook v. Fountain*, (a) *Hughes v. Stubbs*, (b) *Fletcher v. Fletcher*, (c) *Gosling v. Gosling*, (d) *M'Fadden v. Jenkyns*, (e) *Vanderberg v. Palmer*, (g) *Dipple v. Corles*. (h) The mere investment of these sums of stock in the names of the trustees without more, does not raise such a presumption of intention on the part of Mrs. Stanton, that the added fund should be held on the trusts of the settlement as that * the resulting trust * 117 in her favour arising from the absence of any express declaration of trust as to the added fund is rebutted. And this argument applies equally to both portions of the added fund. But if it should be thought that the power given by the deed of April, 1836, to invest the accumulations of dividends attaches the trusts of the deed to that portion of the added fund consisting of such accumulations, then it is submitted that, inasmuch as that clause of the deed has no application to the other unsevered portion of the added fund, there is no such trust attached to that, but that as to that portion there is a resulting trust in favour of the settlor. The mere fact that the two portions of the added fund are unsevered and were always invested in one lump sum is insufficient to raise a presumption rebutting the resulting trust. The evidence in the cause clearly showing that, at the time she made the several subsequent additions to the fund originally placed in the names of the trustees, she was under a misapprehension as to effect of the trusts of the deed, she ought to be at liberty to file a cross bill for the purpose of reforming the settlement.

[The Lord Justice KNIGHT BRUCE inquired whether counsel were willing to have the case disposed of as if a cross-bill had been filed, but without any further evidence than that before the Court, and the counsel agreed to the case being so treated.]

Mr. Hardy appeared for the trustee of the settlement.

(a) 3 Sw. 592.

(b) 1 Hare, 476.

(c) 4 Hare, 67.

(d) 3 Drew. 335.

(e) 1 Hare, 458.

(g) 4 K. & J. 204.

(h) 11 Hare, 183.

Mr. Baily, in reply.— After the statement in *Mrs. Stanton's* answer, that any question as to the further destination of the fund invested after the determination of her life interest under the settlement therein ought not to be raised in her lifetime,
 * 118 * it is submitted that she ought not now at all events to have leave to file a cross-bill. But the evidence in the suit being quite inadequate for the purpose of showing any misapprehension on her part, either at the time of executing the deed or of making the subsequent additions to the trust fund, of the nature of the trusts of the deed, she ought not, after such a lapse of time, to be allowed upon any consideration to file a bill for the purpose of disturbing those trusts.

THE LORD CHANCELLOR. — I am of opinion that this case was properly decided in the Court below. I think it is quite clear, both with regard to the accumulations and the original money, that the investments must be held to be subject to the trusts of the settlement, and that the defendant *Mrs. Stanton* must be held to have been perfectly aware of this.

With regard to the accumulations, not a doubt can be entertained, and I think *Mr. Toller* and *Mr. Smith* have hardly ventured to say with regard to the accumulations which were provided for by the deed of settlement, that there was not what was tantamount to a declaration of trust when the accumulations were made for the purpose of buying additional stock in the name of the trustees. With regard to the surplus money, it is quite clear that whatever the defendant intended to be the destination of the accumulations, she intended to be also the destination of the surplus money, and there was equally a declaration of trust with regard to the whole of the investments.

The only question is, whether she ought to have leave to file a cross-bill, for I think it impossible to hold otherwise than that the appeal must be dismissed as it now stands. With reference
 * 119 to the question of giving her * an opportunity of filing a cross-bill, my opinion is that no leave should be reserved for that purpose, because there seems not to be a possibility of its leading to any good. It would only involve this lady in a fruitless and expensive litigation.

THE LORD JUSTICE KNIGHT BRUCE. — Counsel having stated

their willingness to have this case treated as if there were a bill filed by Mrs. Stanton, raising the question suggested by her answers, and supported only and opposed only by the supporting and opposing evidence now before the Court, I have not the slightest hesitation in saying that if we had such a bill before the Court, and there were no other materials before us than those which we now have, although I do not attribute insincerity to Mrs. Stanton, I should be unable to accede to her demand. I think that the trusts of the settlement in the circumstances of the case attached to the property in dispute.

THE LORD JUSTICE TURNER.—I agree that the trusts of the settlement fasten upon the property. I should be very much inclined to think that it was a case for giving leave to file a cross-bill to relieve this lady, if I thought it probable that there was any evidence forthcoming, or if it was suggested that any evidence could be brought forward, to show that the circumstances under which the investments were made were such as were consistent with their being held for Mrs. Stanton's own benefit. But I do not think that her statement, looking at all the circumstances of the case, would be sufficient evidence. Without meaning to impute to her any false statement upon the subject, but looking at the looseness of her evidence, I do not think there is a case made sufficient to induce the Court to give her an opportunity of filing a cross-bill.

1859. November 21, 22. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The decision in *Fleming v. Self*, 3 De G., M. & G. 997, as to mortgages to building societies, is binding on the Court, and extends to the deduction of redemption moneys paid in by the mortgagor, although that point is not expressly referred to in the judgment.

Where a mortgagee improperly resists redemption, and on taking the accounts a balance is found to be in his hands, the Court has power to charge him with interest on such balance, though he has not been in possession of the mortgaged premises.

THIS was the appeal of the defendants from the decree of Vice-Chancellor STUART, in a suit for the redemption of leasehold property, mortgaged by Mr. William Smith, a shareholder in the "Gloucestershire and Cheltenham Accumulating Fund and Mutual Benefit Society," upon terms similar to those of the decree in *Fleming v. Self*,^(a) the defendants being Mr. Pilkington and others, who were trustees of the society.

The society was established in August, 1845, under the provisions of the 6 & 7 Will. 4, c. 32. The amount of each share was fixed at 120*l*. The monthly subscription upon an unadvanced (or unpurchased) share was 10*s.*, and the redemption or interest money payable on every share from the time of its advance or purchase was, in addition to the monthly subscription already mentioned, fixed at 4*s.* per month, making a total annual payment of 8*l*. 8*s.* for every share advanced or purchased.

The rules providing for these monthly payments were in terms similar to those of the corresponding rules in *Fleming v. Self*.

Rule 10 provided, that if any member who should have purchased any share or shares and secured the repayment thereof upon his or her premises should sell such premises, it should be lawful for the purchaser to take the same chargeable with the debt due to the society, and thenceforth to become answerable to the * 121 society for the * repayment of the subscriptions and other charges as the same should become payable, and that the trustees should thereupon, at the cost of such member, release him or her from all future liability in respect of the moneys thereafter payable upon the shares purchased from the said society, and secured upon the premises sold as before mentioned; and that if any member should be desirous of paying and satisfying the security or securities which should have been given for the same, and should give notice of such his or her desire to the directors, the directors should, within one month thereafter, award to such member the same proportion of profits per share as was allowed on the withdrawal of unpurchased shares, and that the directors should make a deduction of such profits and of the amount of subscriptions paid in by such member from the full amount expressed to be secured in and by the mortgage, and the directors were thereby authorized and empowered to receive the balance in one payment or

(a) 3 De G., M. & G. 997 [(Am. ed.) note (1), and cases cited].

by such instalments as the directors and members should agree upon ; and that on the payment of the balance, together with all fines due in respect of such shares, the directors should order the trustees to deliver all deeds and other documents in their custody relating to the security of such member on such property, and, at his or her costs, to indorse a receipt or acknowledgment on such mortgage, according to the 6 & 7 Will. 4, c. 82, § 5.

Rule 12 provided, that any person who should be desirous of withdrawing from the society any share or shares which should not have been purchased, should be allowed so to do on giving one month's previous notice in writing of such his or her intention to the secretary at any monthly meeting of the society, and that the money subscribed in respect of such share or shares should be repaid to such member, subject only to the forfeitures next

* thereinafter mentioned ; that is to say, if application to *122 withdraw should be made within the first year from the first meeting thereof, a forfeiture of 1*l.* 1*s.* per share in addition to the entrance fee ; if within the second year from the said first meeting, a forfeiture of 10*s.* 6*d.* per share in addition to his or her entrance fee ; if within the third or fourth year from the holding of the said first meeting, he should take out the net amount of subscriptions paid in, exclusive of entrance fee only ; if within the fifth or any subsequent year from the holding of such first meeting, the directors were thereby empowered to allow the member so desirous of withdrawing, out of the profits which the society should have realized, such bonus for the withdrawal of each share as they should from time to time determine.

In June, 1846, the plaintiff became possessed of four shares in the society, and on the 30th June, 1846, he executed the deed under which the question arose.

The deed recited the title of the plaintiff to the property comprised in it, the establishment of the society pursuant to the Act, that the plaintiff was the holder of four shares, and would, on the termination of such society, be entitled to receive out of the funds thereof in respect of each such share the sum of 120*l.*, subject to the rules and regulations of the society, and to the monthly payment in the mean time of 14*s.* in respect of each such share, and that the plaintiff had applied to be allowed to anticipate the said shares, and to receive for present payment and in discharge of all future claims upon the funds of the society in respect thereof the

sum of 240*l.*, to which the directors of the society had consented on having the payments to become due in respect of the said

* 123 shares according to the then present or * any future rules of the society secured in manner thereafter mentioned.

The deed then witnessed, that, in consideration of 240*l.* paid to the plaintiff by the trustees in full payment, satisfaction, and discharge of all future claims upon the funds of the society in respect of the aforesaid shares, the plaintiff did thereby appoint a certain piece of land and two cottages upon the same to the use of the defendants, their heirs and assigns, upon trust, so long as the plaintiff, his heirs, executors, administrators, or assigns should duly make the several payments, and observe and perform the requisitions prescribed or to be prescribed by the rules of the society for the time being in respect of the aforesaid shares, to permit the plaintiff, his heirs and assigns, to hold and enjoy the said hereditaments and premises, and receive the rents and profits thereof; but, in case he or they should at any time neglect or refuse for six monthly nights to make, observe, and perform all or any of the payments and regulations aforesaid, upon trust, at any time thereafter if they the said trustees should see fit (but without compulsion) to enter into possession and receipt of the rents, issues, and profits of the said hereditaments and premises, with full power to demise and lease the same hereditaments and premises for any term not exceeding fourteen years, at rack-rent, and to apply the rents, and profits of the same hereditaments and premises (after payment of all expenses attending the collection thereof) in discharge of the payments then due and from time to time to become due from the plaintiff, his heirs, executors, administrators, or assigns, in respect of the aforesaid shares; and if such rents and profits should at any time be insufficient for that purpose, upon trust that they the said defendants, or their assigns, or the survivor of them, his heirs or assigns, should at any

* 124 time or times thereafter, when they * or he should see fit, without any further consent or concurrence of the plaintiff, his heirs or assigns, and although he or they might be under any disability or object thereto, absolutely sell and dispose of the hereditaments and premises in manner therein mentioned. The deed then declared that the defendants should stand possessed of the moneys to arise from any such sale or otherwise come to their hands by virtue of the trusts aforesaid, upon trust, in the first

place, to pay the costs, charges, and expenses attending any such sale or collection of rents as aforesaid, or otherwise incident to or incurred in the execution of the trusts and powers aforesaid; and, in the next place, to retain unto the society all sums of money, subscriptions, and other payments then due, or which might afterwards become due, by the plaintiff, his heirs, executors, administrators, and assigns, in respect of the shares, by virtue of the rules and regulations of the society or otherwise howsoever; and upon trust to pay over the residue thereof (if any) unto the plaintiff, his heirs or assigns.

In July, 1855, a bonus of 25*l.* per share was declared.

The plaintiff some time prior to the 25th June, 1856; gave notice, in pursuance of rule 10, of his intention to redeem his securities, and having paid all the moneys and subscriptions due from him to that time, he thenceforth ceased to make any further payments in respect of his shares.

On the 23d October, 1856, the plaintiff again gave notice of his desire to redeem, pursuant to rule 10.

The trustees refused, however, to award the plaintiff any bonus or portion of profit on his shares, or to permit * him * 125 to redeem his property, except upon the terms of his paying up the subscriptions and redemption moneys claimed by them as having accrued upon his shares since the 25th June, 1856.

The plaintiff thereupon filed his bill, praying that it might be declared that he was, on the 24th October, 1856, entitled, on redeeming his mortgage security, to the bonus of 25*l.* per share upon each of his shares in the society; that an account might be taken of what, on that day, was owing from the plaintiff to the society, or from the society to the plaintiff, and that on taking such account the plaintiff might be credited with the amount of bonuses to which it should be declared he was entitled; that the defendants might be decreed to pay to the plaintiff out of the funds and moneys of the society what, upon taking the accounts, should appear to have been payable to him on redeeming his mortgage security pursuant to the notice on the 24th October, 1856, together with interest thereon at 4*l.* per cent per annum; that the defendants might be restrained from dissolving or terminating the society, and from distributing or parting with the funds or moneys of the society, without retaining a sufficient part thereof, and otherwise

making due provision thereout, to satisfy the plaintiff's claims ; and that the defendants might be ordered to pay the costs of the suit.

Upon the cause coming on to be heard before Vice-Chancellor STUART in December, 1857, affidavits were read on behalf of the defendants, from which it appeared that the plaintiff had been, since July, 1855, one of the active directors of the society, and as such had been one of the parties to fix the terms upon which borrowing members of the society might withdraw, and under which

every borrowing member except himself had withdrawn ;
 * 126 * and that at the annual meeting of the society held on the 28th July, 1856, the plaintiff and others tried to pass a resolution which was alleged to be inconsistent with the relief which he now sought. Other details as to the conduct of the plaintiff were the subject of evidence, but as the argument and decision on the appeal did not turn on these points, it is unnecessary further to advert to them.

They had, however, formed the principal or sole ground of defence before the Vice-Chancellor, it having been there conceded, that unless the plaintiff by his conduct had precluded himself from insisting upon the construction put upon the rules of the society in *Fleming v. Self*, (a) which were in terms similar to those under consideration, the decision in *Fleming v. Self* must govern the present case.

His Honor was of opinion that there had been nothing fraudulent in the conduct of the plaintiff, and that the mere circumstance that he had acquiesced in, and apparently advised and approved of, a new principle of redemption, which had been acted upon by the other borrowing members of the society, was not sufficient to disentitle him to insist in his own case upon the terms of redemption established by *Fleming v. Self*, and his Honor made a decree for redemption upon those terms accordingly ; but directed that the plaintiff should be paid 50*l.*, and the defendants 50*l.*, for their respective costs up to the hearing, but that the funds of the society were not to be further burdened in respect of the costs up to that time ; the plaintiff and the defendants both to be allowed their costs of taking the account out of the funds of the society, the residue of the costs to be borne by the parties themselves.

(a) 3 De G., M. & G. 997.

* Upon the accounts being afterwards taken, it appeared * 127 that the total amount payable by the plaintiff in respect of his shares, up to the calculated time of the expiration of the society, exceeded the amount actually paid by him by 28*l*. This being deducted from the 100*l*. the amount of bonuses on the plaintiff's four shares, left a balance of 72*l*. due to him. The defendants, however, contended that the redemption moneys, amounting to 96*l*., and paid by the plaintiff in respect of the advance made to him, ought not to have been allowed to him as a credit, but must remain charged against him.

The questions argued upon the appeal were, first, whether the plaintiff ought to have such credit in respect of redemption moneys; and, secondly, if he ought to have such credit, whether he was entitled also to participate in the bonus or profits; and, thirdly, as to the propriety of the direction in the Vice-Chancellor's decree as to the costs.

Mr. Malins and *Mr. Hardy*, for the plaintiff, in support of the decree appealed from. — The rules to be construed in this case, as well as the deed of security, are, in substance, the same as those upon which Lord CRANWORTH has put a construction in *Fleming v. Self* (a). It is submitted, and it was not contested before the Vice-Chancellor, that in point of law the decision upon the present case must be governed by the decree in *Fleming v. Self*, and that the rules and deed must be construed upon the principle there adopted. In taking the account, therefore, we admit that the plaintiff should be charged with all subscriptions and redemption-money which will become due and payable by him up to the termination of the longest period during which the society may possibly last, calculated in the mode * pointed out in *Fleming v. Self*; but * 128 against that charge he should, in accordance with rule 10, be declared entitled to credit for the bonus on each share, payable to withdrawing members at the time when he gave his notice, and for the amount of subscriptions which have been paid in by him, including in the term "subscriptions" not only the monthly payments of 10*s*. per share, payable in respect of shares, whether advanced or unadvanced, but the monthly payments also of 4*s*.

(a) 3 De G., M. & G. 997.

per share which have been made by him in respect of redemption-money.

They cited *Seagrave v. Pope*, (a) *Farmer v. Smith*, (b) *Archer v. Harrison*. (c)

Mr. Bacon and *Mr. Jessel*, for the defendants, in support of the appeal. — The borrowing member will not stand on an equality with the non-borrowing member, if he be held to be entitled to profits, and nevertheless be allowed to deduct the sums paid by him for redemption-money. The members of the association are partners. By rule 12, on a month's notice any member may withdraw, and his subscriptions will be repaid to him; and if he withdraw in the fifth or any subsequent year from the holding of the first meeting of the society, he is to have a proportion of the profits. The reason is, that the society having had the use of his money, the profits are returned for that use of his money. Rule 10 puts the borrowing member on the same footing as the non-borrowing. The former is thereby required to pay sums in respect of the principal and interest of the sum borrowed; and, as an equivalent for the loss which the society has sustained by not having the benefit of his subscriptions, he must pay not only

* 129 the * principal and interest in respect of the mortgage debt, but redemption moneys also. Upon that assumption alone can the result of the decision of Vice-Chancellor KNIGHT BRUCE in *Seagrave v. Pope* be arrived at; and the judgment of Lord TRURO upon the appeal in that case, adopts the same conclusion. So Vice-Chancellor WOOD, in his judgment in *Fleming v. Self*, (d) on the ground that the profits were calculated upon an erroneous principle, refused to allow them as interest to the advancing members, and that principle was not questioned by the Lord Chancellor in his judgment upon the appeal. There are, therefore, four decisions, three of which lead to the fair results of equality between the different classes of members; the fourth, namely, the decision of Lord CRANWORTH in *Fleming v. Self*, to the unfair result of paying the borrowing member for redeeming. Now, although *Fleming v. Self* was binding on the Vice-Chancellor, it is not on your Lordships, if you should think the decision in that case erroneous.

(a) 1 De G., M. & G. 783.

(c) 7 De G., M. & G. 404.

(b) 5 Jur. N. S. 1533, n.

(d) 1 Kay, 521.

[THE LORD CHANCELLOR.—To have that decision reversed, must you not go to the House of Lords? It is the custom of all Courts, whether of common law or equity, to respect the judgment of Courts of co-ordinate jurisdiction, and to respect also their own unless manifestly wrong.]

Courts of Equity have not considered themselves so fettered. *Attorney-General v. Wiggston*, (a) *Page v. May*. (b) Another part of the decree of which we complain is, that if, on taking the accounts, the balance is found against the plaintiff, he is to pay the balance; but if against the defendants, they are to pay not only such balance, but interest.

[THE LORD JUSTICE TURNER.—This is not a case of rests, but of an ultimate balance in the hands of a mortgagee who has received more than he is *entitled to. Do you deny the *130 right of the mortgagor to charge the mortgagee with interest if he has improperly resisted redemption?]

In the course of a long series of decisions, there has not been one in which a mortgagee has been held liable to pay interest upon a balance, except where he has been in possession, and the interest has fallen into arrear, while he has been in such possession. There is no authority for charging interest at all; but if it is charged, why not on both sides? The question was never discussed until the present time.

[THE LORD CHANCELLOR.—Upon the hearing before the Vice-Chancellor, the question appears to have been one, not of law, but of conduct, which it was contended had precluded the plaintiff from obtaining relief, and his claim was admitted to be valid but for such alleged course of conduct.]

The last point of which we complain is as to the costs.

If our contention on the main point of the appeal be right, a balance will be due from the plaintiff, in which case, as he seeks redemption, we ought not to pay costs. At any rate it is submitted that the directions as to costs should be struck out of the decree appealed from, by which means the real defendants, i.e.

(a) 16 Beav. 313.

(b) 24 Beav. 323.

the society, would be left to pay the costs. The direction as it stands contradicts the rule of the society providing for the indemnity of the trustees against costs.

Mr. Hardy, in reply. — The society comprises three classes of members, *i.e.* borrowing members, withdrawing members, and continuing members. The borrowing member obtains an advance at an early period of the existence of the society, and only redeems at a late period. On rule and theory every borrowing member redeems. He does so as soon as the society is so far advanced in age, and at a period when such a bonus is awarded by the directors as to make it worth his while to do so. If he redeemed shortly after borrowing, he would get no advantage, but would have to pay a most exorbitant rate of interest on redemption. Redeeming early, he would not receive any bonus or profits; but redeeming late, he gets his bonus, less by the forfeiture of his monthly payments. The bonus was declared in July, 1855. The plaintiff has done nothing unfair, but precisely that which the theory of these societies contemplates. In June, 1846, when he gave the mortgage, he received 60*l.* per share. That is all he ever received. In October, 1856, when he came to redeem, he had repaid the total amount he had received, and something more. By his monthly subscriptions, he had refunded 60*l.*, and in addition to that he had been paying a further monthly subscription of 4*s.*, or 2*l.* 8*s.* per annum per share, from June, 1846, to June, 1856; in all, 24*l.* Altogether, therefore, he had paid 84*l.* and had thus, long before giving notice to redeem, repaid the 60*l.* which he had received. A member withdrawing after 10 years would have also paid 60*l.*, but no interest, and the society would have had the use of his monthly subscription of 10*s.*, as in the case of the borrowing member. In this respect the borrowing and withdrawing member would be on an equality, but the borrower would have been a more useful member. The enormously increasing rate of interest paid by the borrowing member, makes up the equality between a borrowing member and a withdrawing member. As to the continuing member, the society lasting eleven and a half years, he pays up to the close of the society 69*l.*, and receives at its termination 120*l.* The continuing member receives therefore a profit of 51*l.*, while the profit realized by the borrowing member who redeems is only 23*l.* 8*s.* These advantages would be greatly

enhanced in favour of the continuing member by the terms of redemption contended for. The gross sums to be paid are 10s. per month, and 4s. per * month during the residue of * 132 the society's duration. If, as it is contended, the 4s. per month is to be charged over again, this would exactly neutralize the bonus or profits. Thus the borrowing member would be the servant of the continuing member, who would derive an enormous increase of profit from the advance of the society's money to the borrowing members. What is asked by the defendants is inconsistent with Lord TRURO's decision in *Seagrave v. Pope*. The term "amount of subscriptions paid in," in the 10th rule, means all moneys paid in monthly by the borrowing member to the society, i.e. the 10s. and 4s. per month for subscription moneys and redemption moneys, the result being that the purchasing member is not to be debited over again with any of the monthly subscriptions he may have already paid. That this is the meaning of the term "subscriptions paid in," in the 10th rule, is clear from the interpretation put upon the same word in other rules of the society, as well as from the amalgamation of the two-monthly payments into a lump sum of 14s. in the mortgage deed executed by the plaintiff, and which forms part of his contract with the society. This was also the principle upon which redemption was decreed in *Mosley v. Baker*. (a) So in the decree of the Vice-Chancellor WOOD in *Fleming v. Self*, (b) and the principle of his decision, as regards that question, was not affected by the decree in that case upon the appeal. There is, therefore, nothing in the decree appealed from which the defendants can properly complain of. It contains not a word as to debit or credit, nor as to giving credit for redemption-money paid in taking the account. The present contention as to not giving credit for redemption-money paid is wholly premature, there being nothing in the decree appealed from which precludes the defendants from insisting * before the Judge in * 133 Chambers that their construction is the right one. Then as to the question of interest. The plaintiff, having paid up his subscriptions to June, 1856, the time named in the prospectus as the period of termination of the society, then gave notice of his intention to redeem. He was met by demands of further subscriptions, and ultimately by a refusal to permit redemption, except upon

(a) 6 Hare, 87; on appeal, 3 De G., M. & G. 1032.

(b) 1 Kay, 521.

unreasonable terms. That continued for six months, and the plaintiff's monthly subscriptions of 10*s.* and 4*s.*, for the whole of that period, will have to be paid. The defendants will thus have received a considerable interest, though during the whole time they have withheld from the plaintiff his share of the bonus or profits. According to all principle, therefore, they should be charged with interest upon the balance they have withheld. As to the costs, it is submitted they should be borne by the defendants, the suit having been caused by their refusal to permit redemption upon the terms of the rules of the society.

THE LORD CHANCELLOR.—Having regard to what took place before the Vice-Chancellor, I supposed that it would have been admitted on the appeal that the plaintiff would be entitled to an order in the terms of the Vice-Chancellor's decree, if not disentitled to it by his conduct. Before the Vice-Chancellor, the opposition to the plaintiff's claim was founded, not upon matter of law, but upon certain resolutions passed by the members of the society, and the plaintiff's conduct having regard to those resolutions; and I supposed that we should have been referred to evidence to show that the plaintiff had so conducted himself with reference to the other members of the society in the management of its affairs, that, when this conduct was considered in connection with the regulations of the society, his claim could not be supported.

* 134 * But when the case was before us upon the appeal, the question of conduct was entirely abandoned by the defendants; and it was allowed that the plaintiff must be held entitled to the decree appealed from, unless it could be justly contended on behalf of the society, that, in point of law, he was not so entitled. The question was then argued as matter of law, whether the Vice-Chancellor's decree should be adhered to. It was allowed he was entitled to the bonus, but an entirely new question was raised respecting the redemption moneys. I am of opinion that the answer to that question is involved in the decision of Lord CRANWORTH in *Fleming v. Self*. (a) The decree appealed against is *ipsisimis verbis*, as in *Fleming v. Self*—is on the same rules—and is made under the same circumstances. I must suppose that the question about double payment of redemption money was brought under the consideration of the Court by the counsel in that case;

(a) 3 De G., M. & G. 997 [(Am. ed.) note (1), and cases cited].

and was present to the mind of Lord CRANWORTH, who, after a long and careful consideration of every item of charge and credit, pronounced the decree. There can be little doubt that that decree has been acted upon since by societies of this description. The fair inference is, that it has been considered as laying down the law upon these loan building societies, and that it has been consequently acted upon. It may fairly be supposed that various transactions, by borrowing shareholders and others, have been settled on the foundation of that decision, and we ought, in my opinion at least, to consider ourselves bound by the terms of it. It is a decision which we ought not to disturb, and this appeal must therefore be dismissed, and with costs.

THE LORD JUSTICE KNIGHT BRUCE. — I am not able to convince myself that the decree appealed from should in any part be disturbed, whether as to the interest or the costs.

* THE LORD JUSTICE TURNER. — This case is said to be * 135 one of great importance, because it may regulate mortgages of this description as between the members of these societies. I agree as to the importance of the question; and that very importance induces me to decline to modify the doctrine or unsettle the law on this subject, or the rules to be deduced from former decisions of this Court. There is nothing that occasions greater mischief than to vary the decisions of this Court according to the opinion which each succeeding Judge may entertain of what has been laid down by previous decisions.

According to the true construction of the rules of this society, when a member comes to redeem his mortgage, the account is to be taken, not of what is then due, but of the sums originally secured by the mortgage, and then credit is to be given to the mortgagor for the proper proportion of profits and for the payments which he may have made in respect of monthly subscriptions. That depends on the 10th rule. [His Lordship read the rule.]

The contention is that, as deduction is to be made of profits, and of subscriptions paid in by the mortgagor, that deduction does not extend to redemption moneys, which it is said are payments for interest on the moneys advanced. I am not satisfied that the plaintiff is right on that point. Of this I am satisfied, that the question was distinctly under the consideration of Lord CRAN-

WORTH in *Fleming v. Self*. Though the point is not adverted to in the judgment of Lord CRANWORTH, it is impossible that, when that case was brought before the Court upon its merits, a question of such importance should have escaped attention. Whatever my opinion, therefore, may be, I feel it my duty to abide by the previous decision on the subject.

* 136 * Then it was said that, if the appellants were not entitled to debit the respondent with interest, the respondent, the plaintiff, was not entitled to credit in respect of the profits or bonus declared by the society. That again is a subject on which I do not mean to give an opinion. Possibly all the considerations affecting that question, may not have been fully brought out upon the hearing of *Fleming v. Self*, but the question was adjudicated upon in the decision of that case, and upon that point as well as upon the other I consider myself bound by the decision in that case. A different decision upon either question, if sought for, must be sought in the House of Lords, not here.

With reference to the question of interest, it was stated in argument to be against the rule of the Court to charge interest against a mortgagee not in possession, when there turned out to be a balance in his hands on taking the account. I do not so understand the rule. In *Quarrel v. Beckford*, (a) where the mortgagee held over, and he was so charged, no doubt he was a mortgagee in possession. But the Court, of course, has power to charge a mortgagee not in possession; and if the mortgagee is improperly resisting redemption, that is a case in which interest ought, I think, to be charged against him.¹ My impression is, that there are decisions by which mortgagees not in possession have been so charged. Whether there are such decisions or not, this appears to me a proper case for making one.

I concur with the Lord Chancellor and my learned brother in thinking that this appeal must be dismissed with costs.

(a) 1 Madd. 269.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1241, 1251, 1252.

* OBBE v. BISHOP.

* 137

1859. December 5. Before the LORDS JUSTICES.

G. G. by his will bequeathed all his property to H. G. upon the trusts therein-after mentioned. He then bequeathed his leaseholds to H. G. for life, and after her death he gave part of them to M. B. for life, with remainder to G. G. the younger absolutely, and gave the residue of his property to G. G. absolutely, and appointed H. G. his executrix. G. G. the younger survived the testator, and died intestate in March, 1838. H. G. took out administration to his estate in May, 1838, and died in 1841, appointing M. B. her executrix, who thus became the representative of the testator as well as of H. G. M. B. afterwards took out administration to G. G. the younger. One of the next of kin to G. G. the younger in December, 1858, filed a bill against M. B. for the administration of the estate of G. G. the younger.

Held, that M. B. could not avail herself of any defence founded on the Statutes of Limitations, but that an account of the rents of the leaseholds received by M. B., which was not limited to six years before the filing of the bill, and an account of the personal estate of G. G. the younger, received by H. G. and M. B., respectively, had been rightly directed against M. B.

Per the Lord Justice TURNER. — A demand against the assets of a deceased trustee or personal representative for a breach of trust or misappropriation committed by him is not barred by the lapse of six years after his death.¹

THIS was an appeal by the defendants John Bishop and Mary his wife from part of a decree of Vice-Chancellor STUART.

The bill was filed by Thomas Obbe and his wife, Mrs. Obbe being one of the four next of kin and one of the three coheiresses of George Grew the younger, for the administration of George Grew's estate. One of the questions on this appeal related to the rents of leasehold property, which he derived from his father George Grew the elder.

George Grew the elder had died in 1836, leaving an obscurely worded will dated the 25th of February, 1836, by which he gave all his property to his wife Hannah Grew and William Austin, upon the trusts thereafter mentioned. He then bequeathed to Hannah Grew for life his furniture, &c., and the rents of his freehold and leasehold estates, and after her death he gave part of his leasehold property to the defendant Mary Bishop for life, with remainder to George Grew the younger absolutely, and gave the

¹ See *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545, 553; *Story v. Gape*, 2 Jur. N. S. 706; *Lewin Trusts* (5th Eng. ed.), 650.

*138 residue of *his real and personal property to George Grew the younger absolutely. He appointed Hannah Grew and William Austin executors.

The will was proved by Hannah Grew alone, and she survived William Austin.

George Grew the younger died intestate on the 16th of March, 1838, and letters of administration to his effects were on the 9th of May, 1838, granted to Hannah Grew.

Hannah Grew died on the 12th of March, 1841, leaving a will by which she appointed the defendant Mary Bishop her executrix, who thus became the personal representative of George Grew the elder, as well as of Hannah Grew.

Mary Bishop was one of the three coheiresses, and one of the four next of kin of George Grew the younger, and upon the decease of Hannah Grew she entered into possession not only of the leasehold property given to her for life by the will of George Grew the elder, but also of all the freehold and leasehold property given to George Grew the younger by the same will, as well as of all Hannah Grew's personal estate.

Letters of administration *de bonis non* of George Grew the younger were granted to Mrs. Bishop some time after the decease of Hannah Grew.

The bill filed on the 20th of December, 1858, prayed that the personal estate, and so far as necessary the real estate, of George Grew the younger might be administered, for an account of the rents of the freeholds devised to George Grew the younger

*139 by the will of George Grew * the elder, for payment to the plaintiffs of what was coming from the estate of George Grew the younger to Mrs. Obee as one of his coheiresses and next of kin, and for a partition of the real and leasehold estates.

Vice-Chancellor STUART made on motion a decree directing, first, an account of the personal estate of George Grew the younger (other than the leasehold estate to which he was entitled under the will of George Grew the elder) received by Hannah Grew in her lifetime, or by Mr. and Mrs. Bishop since her decease; secondly, an account of the intestate's leasehold estate to which he was entitled under the will of George Grew the elder, and of the rents and profits thereof received by Mr. and Mrs. Bishop since the decease of Hannah Grew; . . . ninthly, an account of the rents and profits of the intestate's real estate received by Mr. and Mrs. Bishop since

the 20th day of December, 1852 (six years preceding the day of filing the bill).

Mr. and Mrs. Bishop, who had by their answer claimed the benefit of the Statutes of Limitations, appealed from part of this decree, objecting that the account of personal estate received by Hannah Grew ought not to have been directed at all, and that the accounts of personal estate, and rents and profits of leasehold estate, received by Mr. and Mrs. Bishop ought to have been confined to six years before the filing of the bill.

Mr. Malins and Mr. Haig, for the appellants. — As regards the general personal estate received by Hannah Grew, we say that no account ought to have been directed at all, for that the demand against her assets was a mere simple contract debt, and was barred by the lapse of six years. A breach of trust where there * is no instrument under seal creates only a simple contract * 140 debt. *Charlton v. Lowe*, (a) *Adey v. Arnold*, (b) *Brewer v.*

Cox. (c) After the death of a defaulting trustee or personal representative we submit that the Statute of Limitations runs just as in the case of any other simple contract debt, unless the property misappropriated is ear-marked and can be followed. We do not dispute that if it can be traced, it may be recovered from the representative after any length of time, but where it cannot be traced and the demand is a mere money demand, there is no reason why the statute should not apply. We do not contend that a trustee or even an administrator could himself set it up: his fiduciary position raises a personal equity against him which prevents his doing so, and the Statute of Limitations does not apply to him, but his representative is not subject to any such equity. The representative stands in no fiduciary position towards persons claiming against the person whom he represents: they are mere creditors as regards him, and their demands must, by analogy to the Statute of Limitations relating to simple contract debts, be barred by the lapse of six years from the death of the person he represents.

As to the leaseholds, we do not dispute Mrs. Obey's title, her right not having vested in possession till 1841; but we submit that the account of rents ought to have been limited to six years immediately before the filing of the bill. There is no express trust, but

(a) 3 P. Wms. 328.

(c) 3 W. R. 276, V. C. W.

(b) 2 De G., M. & G. 432.

only a specific bequest of the leaseholds. The 42d section of the recent Statute of Limitations therefore applies. Even if the executrix of George Grew the elder was an express trustee of

* 141 the leaseholds, the executrix of the * executrix was not, but only a constructive trustee.

[THE LORD JUSTICE TURNER. — If the representative of the father and the representative of the son had been different persons, would not the son's representative have been bound to sue the father's representative? If so, does not the union of the two characters keep alive the right?]

We submit not, for the present purpose, this being a demand against Mrs. Bishop, solely in her character of personal representative of George Grew the younger.

Mr. Greene and *Mr. Faber*, for the plaintiffs, and *Mr. Erskine*, for a defendant in the same interest with them, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, the united characters borne by Hannah Grew and by Mary Bishop exclude, in my judgment, any defence founded on the Statute of Limitations. As to the rents of the leasehold property, we ought not, in my opinion, to depart from the principle of *Gough v. Bult*, (a) and *Playfair v. Cooper*. (b) As to the testator's general personal estate, Hannah Grew was an express trustee, and upon her death, her personal representative became the personal representative of the testator.

THE LORD JUSTICE TURNER. — I am of the same opinion. I am not at all inclined to depart from the cases which have been decided on the 42d section of the statute, and those cases dispose of the * 142 question as to the rents. With respect to the general * personal estate, I am of opinion that it would be most dangerous to hold that a demand against the assets of a deceased trustee, or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death. (c) Courts of Equity in dealing with equi-

(a) 16 Sim. 323.

(b) 17 Beav. 187.

(c) An eminent member of the Irish bar has referred the reporters to the following cases, as showing that the Court of Chancery in Ireland has taken an opposite view: *Dunne v. Doran*, 13 Ir. Eq. Rep. 545; *Brereton v. Hutchinson*, 2 Ir. Ch. Rep. 648; and 3 Ir. Ch. Rep. 361; *Newport v. Bryan*, 5 Ir. Ch. Rep. 119.

table debts are not bound by the Statute of Limitations, 21 Jac. 1, c. 16; and although they have in many instances adopted a rule grounded on an analogy to that statute, they do not extend that analogy to demands arising out of breaches of trust. The appeal must be dismissed with costs.

In the Matter of WOOD, an alleged Lunatic.

1859. December 5. Before the LORDS JUSTICES.

Two petitions for a commission of lunacy were presented, one by the wife of the lunatic, the other by a nephew jointly with his wife, who was the daughter of the lunatic by a former marriage. The petition of the nephew and his wife was the earlier in date. *Held*, that a wife is not entitled to any preference over a child of the alleged lunatic as to the conduct of proceedings under a commission of lunacy, and that it not being shown that there was any impropriety on the part of the nephew and daughter, or that the petition of the wife was preferable, the conduct of the proceedings ought to be given to the nephew and daughter as having presented the earlier petition.

In this case two petitions for a commission of lunacy had been presented. The earlier of the two was presented by a nephew of the alleged lunatic jointly with his * wife, a * 143 daughter of the alleged lunatic by a former marriage. The other petition was presented by the wife of the alleged lunatic. It was admitted on all hands that the gentleman whose state of mind was to be inquired into was incapable of managing his affairs and was a proper subject for a commission, and the only question was, whether the son-in-law and daughter or the wife ought to have the conduct of the proceedings. The son-in-law had for some time managed the affairs of the alleged lunatic under a power of attorney executed by him, with the approbation of his wife, at a time when his capacity to execute a valid instrument of that nature was very doubtful. Circumstances existed which made it desirable to have an inquiry as to the time at which the lunacy commenced. Long affidavits were filed on both sides, containing personal reflections, to which it is unnecessary to advert, as their Lordships considered them irrelevant to the point in question.

Mr. Malins and *Mr. Roxburgh*, for the petition of the son-in-law and daughter. — Our petition is the earlier in date: we have been the first to take proceedings, which are clearly for the benefit of this gentleman, who evidently needs the protection of the Court; and it lies on the other side to show why we should not have the conduct of the proceedings.

Mr. W. D. Lewis and *Mr. Marten*, for Mrs. Wood. — We submit that the wife of a person alleged to be lunatic has a better claim than any one else to the conduct of the proceedings. The son-in-law is an objectionable person, on the ground that he has been acting under a power of attorney, which probably was given
 * 144 after the lunacy had begun, so that he has a bias in * favour of the lunacy not being carried back. This is a serious disqualification, the case being one in which the circumstances evidently call for an inquiry as to the time when the lunacy commenced. They referred to *In re Whittaker*, (a) *Re Nesbitt*, (b) *Re Webb*, (c) and *Ex parte Tomlinson*. (d)

THE LORD JUSTICE KNIGHT BRUCE. — The petition of the nephew and his wife is the earlier of these petitions; therefore, unless some impropriety on their part is shown, or unless the other is the clearly preferable petition, the conduct of the inquiry ought to rest with them. The case is one in which an inquiry ought to be directed, as to the time when the disability, if any, commenced. The nephew may have a bias on that head, but the objection thence arising will be removed by liberty being given to the wife of the alleged lunatic to attend the proceedings and examine witnesses, the giving of which liberty is not objected to. I think therefore, that there is nothing to take away from the nephew and his wife the priority obtained by the earlier presentation of their petition, and that the conduct of the proceedings ought to be given to them. One order will be made on the two petitions to the following effect: That a commission do issue; that the nephew and his wife, who are the earlier petitioners, have the conduct of the proceedings, but that the wife of the alleged lunatic have liberty to attend and to examine witnesses; the inquiry to extend to the question from what time the lunacy, if any, has existed;

(a) 4 Myl. & Cr. 441.

(c) 2 Phil. 532.

(b) 2 Phil. 245.

(d) 1 Ves. & Bea. 57.

liberty to apply in case of any delay will be given ; and there will be not only a general reservation of the costs of the petitions, but a special reservation as to the costs of the affidavits.

* THE LORD JUSTICE TURNER. — I regret the introduction * 145 of such affidavits as have been filed in this case, as they are not relevant to the question who should have the conduct of the proceedings, and I lay them entirely out of the case. The question lies between the wife and the children. No case has been cited showing that the wife is entitled to any preference over the children as to the conduct of the proceedings under a commission of lunacy ; who ought to be preferred must in each case depend on the circumstances. Now here the person who first moved in the matter was the nephew, who is also a son-in-law. It is admitted that the case is one in which a commission ought to issue, and we must therefore consider it to be for the benefit of the alleged lunatic that proceedings should be taken, for affording to him the protection of the Court. The persons therefore who presented the first petition have been the first to do an act for the benefit of the alleged lunatic, and are *prima facie* entitled to the conduct of the proceedings. It is said, however, that a power of attorney has been given by the alleged lunatic to his nephew, and that the nephew has therefore an interest in not having the lunacy carried back so far as to defeat the power. But I am not satisfied that, in accepting and acting under the power, the nephew had any other motive than a wish to do a kind act for the benefit of his uncle, though in point of law the act may have been an improper one. I am more inclined to take this view of his conduct, as the wife agreed to the giving the power, and I do not think that his holding that power ought to weigh against him on the present occasion. I consider, therefore, that there is nothing to do away with the preference to which he is *prima facie* entitled on the ground of his petition being the earlier in date, and I concur in the order which my learned brother has proposed.

1859. December 7. Before the LORDS JUSTICES.

Lands were devised to trustees "for the use and benefit of E. T., the rents and profits of which estate she shall receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain any thing authorizing a sale or mortgage, the testatrix directed that no sale or mortgage of the estate or its rents should take place during the life of E. T. E. T. was unmarried when the will was made, but married after the death of the testatrix. *Held*, that she took an estate for life for her separate use, without power of anticipation, and that a mortgage made by her and her husband was therefore invalid.¹

THIS was an appeal by the defendants George Camm and Elizabeth his wife, from a decree made by the Master of the Rolls in a foreclosure suit, and proceeding on the footing that the interest of Mrs. Camm in the property was not given to her for her separate use, and that a clause restrictive of alienation was therefore invalid.

The property in question was held under the will of Rebecca Gilbert, made in 1840, by which she devised certain real estates in Nottinghamshire, to two trustees, their heirs and assigns, "for the benefit and use of my natural daughter Elizabeth Towers, the rents and profits of which estate she shall receive from the tenants herself while she lives, whether married or single. If my aforesaid daughter should marry and have children, then I desire that such children may be the joint heirs of the above estate; but if she have no children, then I desire that she may will it to whom she thinks proper; but if she die without a will, then I desire that it may become the property of my next heir then living. But I hereby direct that no sale or mortgage of either the above-named freehold, or the rents arising from it, shall take place during the life of my aforesaid natural daughter. I also hereby further direct that my said daughter or my executors shall, from the rents and profits of the aforesaid freehold, pay to my mother, Elizabeth

¹ See 1 Lead. Cas. in Eq. (3d Am. ed.) [423] 524 *et seq.*, 543, 544, in notes to *Hulme v. Tenant*; *Lewin Trusts* (5th Eng. ed.), 553-556; *Baker v. Bradley*, 7 De G., M. & G. 597.

Towers, the sum of 3s. per week while she lives, and at her death, that they pay 3l. towards the expense of her funeral."

The testatrix died in 1841, and her natural daughter * named in her will, married the defendant Camm in 1843. * 147 In May, 1857, Mr. and Mrs. Camm borrowed 125l. from the plaintiff, on the security of a deposit of the title-deeds of the devised estate with a written memorandum. Camm some time afterwards became a bankrupt, and the plaintiff filed a claim against Mr. and Mrs. Camm, and the assignees, to enforce his security. The Master of the Rolls decided that Mrs. Camm's life-estate was not given to her separate use, and that the proviso in restraint of alienation was therefore nugatory, and he accordingly made an order in favour of the plaintiff. The assignees did not appear, and the order was made on affidavit of service upon them. Mr. and Mrs. Camm appealed without serving the assignees.

Mr. Roundell Palmer and *Mr. Hemming*, for the plaintiff, in support of the order. — We contend that there is no gift here to the daughter's separate use. She was unmarried when the will was made, and the direction that she shall receive the rents, is intended only to express that the trustees who have the legal estate shall not interfere with her receiving them. The words negative the right of the trustees to receive the rents, and so are positively inconsistent with separate use, which must be worked out through a receipt of the rents by them. The language of the testatrix does not point at protection from a husband, but from interference by the trustees. Then looking at the case with regard to the authorities, *Tyler v. Lake* (a) shows that the most explicit conditions as to personal receipt by female legatees, even if all married at the time, will not create a separate use. The observations of Lord COTTENHAM in *Massey v. Parker*, (b) show that * he entirely concurred in this view. In *Blacklow v. Laws*, (c) the words were more favourable to separate use than here, yet Vice-Chancellor WIGRAM held that it was not created, and his remarks show that some words pointed at the exclusion of the husband are necessary. *Hartley v. Hurle*, (d) does not weigh against us, as nothing was decided on the point, though there may be an intimation of an opinion opposed to our conten-

(a) 2 R. & Myl. 183.

(c) 2 Hare, 40.

(b) 2 Myl. & K. 174.

(d) 5 Ves. 540.

tion. The point is one of constant occurrence in conveyancing, on which therefore it is important that the cases should not be disturbed. We say then that there is no limitation to the daughter's separate use, and if that be so, the case is disposed of, as the restraint on alienation must then be invalid. Indeed it does not appear to have been intended as a check upon the daughter, but as a direction to the trustees to prevent dealings with the *corpus* of the property.

[THE LORD JUSTICE KNIGHT BRUCE. — Does not that ascribe to the testatrix an intention to do an illegal and impossible thing ?]

That may be so, but it is impossible to construe the clause in such a way as to prevent its containing directions which are to a great extent contrary to law, and incapable of having effect given to them.

Mr. Lloyd and Mr. Rendall, for the appellants. — The testatrix shows a clear intention by the words "whether married or single" that coverture should make no difference in her daughter's right to receive the rents. A receipt of the rents by the husband would be plainly inconsistent with the express words. The argument of the plaintiff makes the words surplusage, a course against which the

Court is strongly inclined. *Neathway v. Reed.* (a) The * 149 clause restraining alienation has a * legal operation if construed to apply to a life-estate for the daughter's separate use, otherwise not. The trusts do not contemplate a sale or mortgage, so that a direction to the trustees not to sell or mortgage during the daughter's life is out of the question. *Tyler v. Lake* (b) has little bearing on the present question; each case must be decided according to the language of the particular instrument. Some of the observations in that case are not consistent with the current of authorities. It is clear that negative expressions are not necessary. *Margetts v. Barringer*, (c) *Lee v. Prieaux*, (d) *Dixon v. Olmius*. (e) What the testatrix says in this will is tantamount to saying that the daughter's receipts are to be good discharges, whether she be *coverte* or *sole*, which, on the authority of the last-

(a) 3 De G., M. & G. 18.

(d) 3 Bro. C. C. 381.

(b) 2 R. & Myl. 183.

(e) 2 Cox, 414.

(c) 7 Sim. 482.

mentioned case, clearly would create a separate use. The current of decisions is in our favour. *Kirk v. Paulin*, (a) *Tyrrell v. Hope* (b) *Prichard v. Ames*, (c) *Atcherly v. Vernon*, (d) *Baggett v. Meux*, (e) *Steedman v. Poole*. (g)

Mr. R. Palmer, in reply. — It is contended for the appellants that if the husband could receive the rents, the intention of the testatrix would be defeated; but that is not so. The direction amounts to a direction that the trustees shall not interfere whether the daughter be married or single; and the reference to marriage rather tells in favour of my argument. In case of marriage, the husband is her assignee. If the intention was to protect the wife against * her husband, the trustees should have been * 150 directed to interfere. The cases cited against me were cases of gifts to women married at the time, which makes a great difference. In *Lee v. Prieaux*, *Margetts v. Barringer*, *Dixon v. Olmius*, *Tyrrell v. Hope*, and *Kirk v. Paulin*, the words used would not have created separate use if the donee had not been married at the time.

THE LORD JUSTICE KNIGHT BRUCE. — As the assignees under the bankruptcy of the defendant George Camm did not appear before the Master of the Rolls, I think that we may venture to dispose of the case in their absence, although they have not been served with notice of the present appeal. Whether their absence will make what we do ineffectual I give no opinion. The view that I take of this will is, in my judgment, not opposed to any one of the decisions mentioned at the bar, nor to any other decision with which I am acquainted. Giving full weight to the observation, that Elizabeth Camm was unmarried when her mother's will was made, I still think that the will, however inartificially framed, contains a sufficiently formal, sufficiently plain, sufficiently distinct indication of an intention that she should take the devised estate for her separate use without power of anticipation. In my judgment, therefore, the claim must be dismissed, but the case is not one for costs either here or at the Rolls.

(a) 7 Vin. Ab. 96; *Creditor and Bankrupt*, T. 43.

(b) 2 Atk. 561.

(e) 1 Coll. 138.

(c) T. & R. 222.

(g) 6 Hare, 193.

(d) 10 Madd. 518.

THE LORD JUSTICE TURNER. — It is not necessary to give any opinion on the decision in *Tyler v. Lake*, (a) but I do not wish to be supposed to express any dissent from that case, under-
 * 151 standing it * to decide, not that negative words are needed to create a separate estate, but that Courts of Equity will not take away the legal rights of a husband without a clear expression of an intention to that effect. The question, therefore, is whether a clear expression of such an intention is to be found in the present will.¹

The argument for the plaintiff is, that the first disposition being a devise of the estate to the trustees, the object of the testatrix in saying "the rents and profits of which estates she shall receive from the tenants herself whether married or single," was merely to prevent the trustees from interfering with her receiving the rents from the tenants. I think that a narrow construction. The devise to the trustees was for all the purposes of the will, the plaintiff's argument would make them mere depositaries of the legal estate without any duties to perform, but the direction that no sale or mortgage should be made during the life of the daughter shows that they were appointed for a purpose, and it is in my mind plain that the testatrix placed the estate in them that they might protect all the interests given by her will, and among the rest the right given to the daughter to receive the rents from the tenants. Suppose there had been no devise to trustees, but only a devise to the intent that the daughter whether married or single should receive the rents from the tenants, that would, I take it, have been effectual to create an estate for the separate use of the daughter. It was urged that the mere circumstance of the daughter being entitled to receive the rents would not exclude the husband, but that is not the case we have to consider, — the direction is that she shall receive them "whether married or single," thus putting her right on the same footing, whether she is married or single, and for what purpose could that be but to create
 * 152 separate use? The testatrix afterwards * directs that no sale or mortgage of the land or of the rents arising from it shall take place during the life of the daughter. The daughter having the right to receive the rents, what construction can be put

(a) 2 R. & Myl. 183.

¹ See *Lewin Trusts* (5th Eng. ed.), 538; *Perry Trusts*, § 648; 2 *Jarman Wills* (3d Eng. ed.), 21, 22–24 in note.

upon the direction that no sale or mortgage shall be made of the rents during her life than that she shall not have power to anticipate them. This conclusion is fortified by the subsequent clause directing the daughter or the executors to pay 3s. a week to the mother of the testatrix, which appears to mean that the daughter shall pay this sum while she is in receipt of the rents, the trustees while they are. This supports the view that the rents are given to the daughter's separate use. I therefore respectfully differ from the Master of the Rolls, and consider that the gift to the daughter is to her separate use with a restraint on anticipation, and that the claim ought therefore to have been dismissed, but the case is one in which the dismissal ought in my opinion to be without costs.

* In the Matter of JAMES CANT'S ESTATE.

* 153

In the Matter of The LANDS CLAUSES CONSOLIDATION ACT, 1845 ; and of The EASTERN UNION AND HARWICH RAILWAY AND PIER ACT, 1847.

1859. December 9. Before the LORDS JUSTICES.

In orders under the Lands Clauses Act, directing a company to pay costs, the omission of the usual words, "except such costs (if any) as are occasioned by litigation between adverse claimants," ought not to be ordered except in very clear cases.

The words "such as are occasioned by litigation between adverse claimants," in the 80th section of the Lands Clauses Act, refer to "costs," and not to the next antecedent "proceedings." Land devised by the will of J. C. was taken by a railway company, and the money paid into Court. Adverse claims to it arising under his will, the devisees appeared by separate counsel on a petition for payment of it out of Court, and argued the question arising between them. *Held*, that the case was not one where the words of exception could properly be omitted from the order.¹

THIS was an appeal by the Eastern Union Railway Company from part of an order of Vice-Chancellor STUART, made under the Lands Clauses Consolidation Act, their objection being that his

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1004, 1463, 1464.

Honor had refused to insert in the direction that the company should pay costs, the usual words of exception "except such costs (if any) as are occasioned by litigation between adverse claimants."

The testator, James Cant, gave all his real and personal estate to trustees, upon trust for his widow for life, and after her death upon trust to convert it into money, which he directed to be divided among his ten children. He directed that his trustees, before selling a certain garden, should offer it to his son Charles Cant, for 450*l.* During the life of the widow the Eastern Union Railway Company took this garden for the purposes of their Act, at the price of 700*l.*, which was paid into Court and invested, and the dividends were paid to the widow during her life. Upon her death Charles Cant claimed to be entitled to the fund in Court (amounting to 882*l.* 18*s.* 2*d.* consols), which represented

* 154 the purchase-money, * on payment to the trustees of 450*l.*,

and gave notice to the surviving trustee that he claimed to exercise the option of purchase given him by the will. The surviving trustee (who was one of the testator's children), and a mortgagee of his beneficial interest in the fund, presented a petition for payment out of Court to the trustee or to the persons beneficially entitled. On the hearing of this petition, the question was argued whether the right of pre-emption was defeated; the petitioners — the children of the testator other than the trustee and Charles Cant, and Charles Cant respectively appearing by different counsel. The Vice-Chancellor decided that the right of pre-emption was gone, and by order dated the 9th of May, 1859, directed payment to the children in tenths, making the usual order as to payment of costs by the company, with this exception, that the usual words with respect to costs occasioned by litigation between adverse claimants, were omitted, his Honor considering that they were inapplicable to the circumstances of this case. Charles Cant appealed, and on the 8th of July, 1859, the Lords Justices reversed the decision on the principal point, holding Charles Cant still entitled to the benefit of the option of purchase. (a)

Their Lordships accordingly made an order directing that the Vice-Chancellor's order should be varied, except as to the direction for taxation and payment of the costs of the application for that order, and except as to the direction for sale of the 882*l.* 18*s.* 2*d.*

(a) 4 De G. & J. 503.

bank annuities. Then followed a direction to tax the costs of the appeal. And it was ordered that the order of the 9th of May, 1859, when varied except as aforesaid, should be as follows: Order to pay out of the sale moneys and the cash in Court arising from dividends, the sum of 250*l.* * (the difference * 155 between the price named in the will and the price paid by the railway company), to Charles Cant, with half a year's interest at 3*l.* per cent, a dividend on the stock having accrued due. Direction for payment of the costs of the appeal out of the residue of the above moneys, and then a direction for payment of the ultimate residue in tenths to the persons beneficially entitled.

The solicitors of the railway company intimated their dissatisfaction with the omission of the usual words from the order, but did not present a petition of appeal until the fund had been paid out, and the taxation of costs was before the taxing master. They then found that he considered himself wholly precluded from entering into the question whether any of the costs should be disallowed on the ground of their arising from litigation between adverse claimants; and thereupon they presented their petition of appeal to have the usual words inserted in the order.

Mr. Selwyn and *Mr. Locock Webb*, for the railway company, in support of the appeal. — The costs of getting the fund out of Court have been seriously increased by this dispute with which the company have nothing to do. It is true that no parties have appeared on the petition, except persons who must have been served had the right of pre-emption not been given; but had this dispute not arisen, they would in the ordinary course of things have appeared by one counsel. There has clearly been a litigation between adverse claimants, and the Court will not take upon itself to say that no costs have been occasioned by it, but will leave that to the taxing master in the first instance. If his decision is appealed from, the Court will have before it full materials on which to form a correct conclusion, but it has no means of safely coming now to the conclusion that this litigation has occasioned no costs. The usual * words, therefore, ought to be inserted. *Mel-* * 156
ling v. Bird, (a) *Ex parte Gardiner*, *Re Eastern Counties Railway Company*, (b) *Re Hore's Estate*. (c)

(a) 17 Jur. 155.

(b) 3 Rail. Cas. 117.

(c) 5 Rail. Cas. 592.

Mr. Bacon and *Mr. Shebbeare*, for the original petitioners; *Mr. Giffard* and *Mr. F. C. J. Millar*, for Charles Cant; and *Mr. H. F. Shebbeare*, for the other children of the testator. — The 80th section of the Lands Clauses Act provides that the company shall pay all the costs incidental to their taking the land, except those of proceedings occasioned by litigation between adverse claimants. Here there have not been any such proceedings except the appeal of Charles Cant, the costs of which have been otherwise provided for; the whole matter was disposed of on a petition for payment out of the fund, on which no persons appeared but those who must have appeared if there had not been any dispute at all. The appeal is one for costs only, and ought to be dismissed on that ground. Moreover, the company have allowed an unreasonable length of time to elapse before appealing, the distribution of the fund having been allowed to take place before they gave any intimation of their intention to appeal.

Mr. Webb, in reply. — The case is clearly one in which an appeal for costs will lie. *Chappell v. Purday*. (a) It involves a general principle, and one which, however trifling the results may be in any particular case, is of great importance to railway companies, as these cases are constantly recurring. The “such” in the 80th clause of the Act, evidently refers to “costs,” not to “pro-
 * 157 ceedings.” Proceedings * cannot be said to be occasioned by litigation, the litigation consists solely of proceedings, and the Court will not be inclined to strain the words to make the company bear costs occasioned by a litigation between other parties. As regards the lapse of time, the opposite parties well knew that we objected to the form of order. We did not wish to cause expense by appealing unnecessarily, and therefore did not appeal until we found that the taxing master considered himself bound to allow all the costs of the parties beneficially entitled, just in the same way as if the order had been for payment of the costs of a suit to ascertain the title to the fund.

THE LORD JUSTICE KNIGHT BRUCE. — The usual and I think the correct form of order in cases of this nature is to direct the company to pay the costs with an express exception of the costs (if any) occasioned by litigation between adverse claimants. That

(a) 2 Phil. 227.

settled form ought not to be departed from without clear reason. Now if it had clearly appeared in this case that no costs could have been occasioned by litigation between adverse claimants, it might have been right to leave out the exception ; but speaking with deference to the Vice-Chancellor, it does not I think appear with clearness or distinctness, that there are not any costs which have been so occasioned ; and it would therefore, as it seems to me, have been better to adhere to the usual form. As to the time which has elapsed, I think that the company in the circumstances of this case have come neither too early nor too late, and that they are entitled to have words of exception inserted, though the manner of doing so may require particular attention ; the order has already been before us, and has already been altered.

* THE LORD JUSTICE TURNER. — It is much to be regretted * 158 that an appeal should come before us on a question of this nature, arising out of a deviation from the general form of order settled for cases of this description. It is, however, impossible to say, that it is not a question of importance.

The case involves two points ; first, whether the appeal is too late ; secondly, whether the decision is in substance right or wrong. As to the first point, the only argument to show the appeal to be too late, is that the solicitors of the claimants to the fund, relying upon getting their costs from the company, have allowed their clients to receive the fund and so have lost their lien ; but the answer to this is, that the solicitors knew all along that the railway company objected to the form of the order, so they cannot urge that they have been prejudiced by the short delay that has taken place.

Then as to the merits. The form of order to be made in cases of this description has been settled and acted on by all the branches of the Court, and is one which lets justice be done at a small expense. The Court no doubt may take upon itself to decide that there are no costs which have been occasioned by litigation between adverse claimants, and direct the omission of the words of exception, but it ought not, in my opinion, so to decide except in a very plain case. It is very important to adhere to the settled forms of orders. If the construction of the 80th section of the Lands Clauses Consolidation Act contended for by the respondents, were held to be the correct one, this probably might be held to be a very plain case ; but I do not agree in that construction. The

Act provides that the Court may order the company to
 * 159 * pay "the costs of the purchase, or taking of the lands &c.
 and also the costs of obtaining the proper orders for
 any of the purposes aforesaid, and of the orders for the payment of
 the dividends and interest of the securities upon which such
 moneys shall be invested, and of all proceedings relating thereto,
 except such as are occasioned by litigation between adverse claim-
 ants." If the word "such" refers to "proceedings," I think the
 order under appeal correct, but in my opinion "such" refers not
 to "proceedings" but to "costs;" for proceedings are not occa-
 sioned by litigation, but are themselves the litigation, so that the
 word "such" cannot reasonably be referred to "proceedings,"
 though that is the last antecedent. Here there was a contest
 between adverse claimants which proceeded to what I think must
 be deemed litigation, when the case came before the Court, and I
 think it impossible to say beforehand that there may not be costs
 which have been occasioned by that litigation, and which therefore
 the company ought not to be ordered to pay. The order therefore
 ought, I think, to be altered into the common form.

1859. December 2, 3, 12. Before the Lord Chancellor Lord CAMPBELL.

A testator gave all his real estate, situate as described in his will, to trustees, to have and to hold to them and the survivor of them for ever, or otherwise, according to the several and respective natures and tenures thereof on certain trusts: *Held*, that the leasehold as well as the freehold property of the testator at the place mentioned passed.¹

One of the next of kin of a testator instituted a suit for the administration of his estate, and obtained a decree directing inquiries whether the testator died seised of any freehold estate, and, if necessary, who was his heir-at-law. The heir-at-law, on being served with notice of the decree, came in and proved her pedigree: *Held*, that she was entitled to her general costs of so doing.²

THIS was the appeal of the heiress-at-law of the testator in the cause, and her husband, who had been served with the decree, from an order of the Master of the Rolls made on further consid-

¹ See 1 Jarman Wills (3d Eng. ed.), 639.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1213, 1428.

eration, so far as that order declared that certain legacies of 200*l.* and 200*l.* each were charged exclusively on the freehold estate of the testator ; and so far as the order omitted to give the appellants their costs of proving the pedigree of the heiress-at-law.

The material parts of the will of the testator, dated the 17th August, 1833, were in the terms following : —

“ In the first place, I give and devise all my real estate lying and being within Foxup, in the township of Halton Gill aforesaid, unto my distant cousin Thomas Farnhill and Joseph Stocks, to have and to hold to them the said Thomas Farnhill and Joseph Stocks, and the survivor of them for ever or otherwise, according to the several and respective natures and tenures thereof ; in trust, nevertheless, and to and for the only proper use and behoof of the persons hereinafter mentioned, and subject to such conditions as shall be herein expressed. Also my will and mind is, and I do hereby order and direct, that the said Thomas Farnhill and Joseph Stocks, or the survivor of them, shall, as soon as convenient after my decease, be empowered, and they are hereby empowered to sell my real estate herein above mentioned, subject nevertheless to and charged and chargeable with the sum of 200*l.* of lawful * British * 161 money, unto my cousin Henry Swift, or his lawful issue ; and in case there be more than one, then the said 200*l.* to be equally divided amongst them, share and share alike, be they male or female. Also, I do hereby charge my said estate with the further sum of 200*l.* of like money to be paid unto the lawful issue of my late cousin Mary Swift, sister of the above-named Henry Swift, to be equally divided amongst them, if more than one, male or female, share and share alike. And in case the said legatees be either or both of them dead without leaving issue as aforesaid, then my will and mind is that the said legacy or legacies of 200*l.* or 400*l.* as the case may be, be paid to the nearest akin on my mother's side ; the said legacies to be paid at the end of twelve months after my decease, if convenient. Likewise, I hereby give and bequeath all my personal estate unto the said Thomas Farnhill and Joseph Stocks, they paying thereout all my just debts, funeral expenses, and probate of this my will, if the same will extend so far ; but if not, then I hereby will, order, and direct that the deficiency shall be paid out of the rents, issues, and profits of my real estate. And in that case my will and mind is, that the said Thomas Farn-

hill and Joseph Stocks shall have all their reasonable charges and expenses any way incurred by or by reason of the execution of this my will." "When all debts have been discharged as aforesaid, then my will and mind is, that the residue and remainder of all moneys arising from the sale of my real and personal estate be equally divided by the said Thomas Farnhill and Joseph Stocks, between Anne Colbeck, of Carlinghow, and Mary the wife of John Schofield, of Gomersall, in the parish of Birstall. Lastly, I do hereby constitute, nominate, and appoint the said Thomas Farnhill and Joseph Stocks, executors of this my last will and testament."

* 162 * The testator afterwards signed an unattested codicil, dated the 2d February, 1837, which was as follows : —

"Whereas I, Thomas Lindley, of, &c. did, by my last will and testament in writing, dated the 17th August, 1833, give and bequeath unto my cousin Henry Swift and his sister Mary Swift, before she was married, the sum of 400*l.*, and in case they and their issue were extinct, to their nearest relations. Now my will and mind is, as it then was, that my distant cousin James Swift, of, &c., should take, receive, and enjoy the said 400*l.* in such manner as my said cousins and their issue should have received the same."

Thomas Lindley, the testator, died on the 8th January, 1847, having survived both the residuary legatees named in his will; and letters of administration of his estate and effects, with the will and codicil annexed, were soon afterwards taken out by James Swift, the legatee named in the codicil.

The plaintiff in the present suit claimed to be one of the next of kin of the testator, and by his bill alleged that the testator, by reason of the death in his lifetime of the residuary legatees named in his will, had died intestate as to the whole of his estate, except as to the two legacies of 200*l.* each, given by the will; that he believed that the testator's property consisted, at the respective dates of his will and of his death, partly of freeholds and partly of leaseholds. The prayer was for an account of the testator's leasehold and personal estate, and for their application in a due course of administration, and that all proper inquiries might be directed for discovering who were the testator's next of kin, and, if necessary, inquiries whether the testator, at the respective dates of

his * will and of his death, was seised of freehold heredit- * 163
aments; and, if necessary, who was his heir-at-law at the
time of his decease; and if the Court should be of opinion that
the testator was so seised, then for a declaration that the legacies
charged by the will on such real estate, might be raised accordingly.

The original decree was made on the 25th May, 1857, and
directed inquiries as prayed by the bill. The decree was, under
an order dated the 22d July, 1858, served upon the appellant as
heiress-at-law of the testator, and upon her husband. They both
attended before the chief clerk by their solicitor, and brought for-
ward the necessary evidence of pedigree.

The appeal from the refusal of the Master of the Rolls to allow
the heiress-at-law the costs of making out and proving her pedigree
was not included in the petition of appeal, but was made *ore tenus*
at the bar on her behalf.

The chief clerk's certificate, dated the 19th April, 1859, certi-
fied that the real estate of which the testator was seised at the
respective dates of his will and of his death, consisted of 121 acres
2 perches of pasture land, called Foxup Outmoor, situate in the
township of Halton Gill, in the parish of Arncliffe, Yorkshire;
that the leasehold property, of which the testator was possessed at
his death, consisted of 73a. 2r. 16p. of lands situate in the said
township of Halton Gill, held at a yearly rent of 19s. 6d., for the
residue of a term of 2000 years, which commenced in the reign of
Charles II.; that his leasehold property was contiguous, or nearly
so, to his freehold estate, and that the whole was let to one
tenant * from year to year, at an entire rent of 70*l.* per * 164
annum, of which 14*l.* was attributable to the freehold, and
56*l.* to the leasehold estate. It appeared, also, that under the
decree subsequently made on further directions, the leasehold and
freehold had been sold together, and that, of the price paid, 520*l.*
only was attributed to the freehold premises, while 2150*l.* was
attributed to the leaseholds.

Mr. Elmsley and *Mr. G. Lake Russell*, in support of the appeal.
— It is submitted that the legacies of 200*l.* and 200*l.* given by the
testator's will and codicil are charged ratably upon the freehold
and leasehold estates at Foxup, of which he died seised and pos-
sessed. This is apparent upon the clause itself, in which his real
estate is devised, the words of which afford a key to the sense in

which he uses the term, "real estate." The devise subject to the charge is of "all my real estate lying and being, &c., within, &c., unto the trustees named, to have and to hold to them for ever, or otherwise, according to the several and respective natures and tenures thereof." The words "for ever" are of themselves operative to pass real estate of fee-simple tenure. The subsequent words, "or otherwise," therefore, must be deemed inoperative, unless they are held to apply to the chattels real; and the construction contended for is fortified by the words "according to their several natures and tenures." "Natures and tenures," being in the plural, show that the testator was aware that he had real estate of other tenure than in fee-simple. All these words, however, must be considered as mere surplusage, if the construction put upon the clause by the Master of the Rolls is to prevail. The term "real estate" does not include lands of leasehold

* 165 * tenure, *proprio vigore*, but may be controlled by the context so as to include them, and the context in the clause in question itself is abundantly sufficient for that purpose. This construction is fortified by the circumstances existing in this case at the date of the will: viz.,—that of the leasehold property being much more valuable than the freehold, which was barely sufficient in value to provide for the charge of the legacies; and the circumstance of the two descriptions of property, if not contiguous, being so nearly so as to be conveniently held together, and of their having been then and having ever since remained in the occupation of the same tenant at an entire rent.

Much less than is here proved has been held sufficient to control the strict technical meaning of the words "real estate," so as to bring within them the testator's leasehold property. *Hartley v. Hurle*, (a) *Addis v. Clement*, (b) *Hobson v. Blackburn*, (c) *Goodman v. Edwards*, (d) *Thompson v. Lawley*, (e) *Doe d. Bellasyse v. Earl of Lucan*, (g) *Lane v. Stanhope*, (h) *Pistol v. Riccardson*, (i) more fully in Mr. Cox's note to *Addis v. Clement*, (k) *Lowther v. Cavendish*, (l) *Turner v. Husler*, (m) *Knotsford v. Gardner*. (n)

(a) 5 Ves. 540.

(b) 2 P. Wms. 456.

(c) 1 Myl. & K. 571.

(d) 2 Myl. & K. 759.

(e) 2 Bos. & Pul. 303.

(g) 9 East, 448.

(h) 6 T. R. 345.

(i) 1 H. Bl. 26 (n).

(k) 2 P. Wms. 459.

(l) 1 Eden, 99.

(m) 1 Bro. C. C. 78.

(n) 2 Atk. 460.

Next it is submitted that the decree of the Master of the Rolls should be varied, by allowing the heiress-at-law the costs of making out her pedigree. The plaintiff in the suit is one of the next of kin of the testator, the defendant his legal personal representative. The real * estate is not represented on the record at * 166 all. Under the old practice, the suit so framed could not have been prosecuted; but under the modern practice, while the suit is prosecuting in Chambers, those who have an interest in the real estate are enabled to come in under the decree. The bill contains a statement that the plaintiff does not know who is the heir-at-law, and it submits that if it should appear that the testator at the date of his will had real estate, inquiries should be directed with a view to discover who was his heir-at-law. By the decree an inquiry to that effect is accordingly directed. The appellant is then served with a summons as heiress-at-law, and, being so served, she comes in under the decree. She is brought before the Court, not for her own benefit, but because the plaintiff cannot proceed in her absence. Being here, a pedigree is required from her, proof of which she accordingly furnishes. Ought not the estate to bear the expense of this proof, which has been furnished for the benefit of the parties to the suit? The plaintiff has been allowed his costs of proving his pedigree as one of the next of kin of the testator. Why, then, should those of the heiress-at-law be refused?

Mr. Roundell Palmer and *Mr. Hingeston*, for the plaintiff, in support of the decree at the Rolls. — The expression “real estate” has a more rigid legal signification than the word “lands,” or “messuages,” or “hereditaments;” independently of any rule of construction. But by the words “lands and hereditaments” the fee-simple lands alone pass, where the testator has both freehold and leasehold estates. *Rose v. Bartlett.* (a) The expression “real estate” signifies that of which the contrary is signified by the expression, “personal estate.” * The testator, by this * 167 will, deals with all his real estate and all his personal estate; and the argument is, that leasehold property, which in law is personal estate, does not pass under the description “personal estate,” but under the description “real estate.” If the context shows this, and the will explains itself, however inaccurately the words may be used, *cadit quæstio*. But to have such an effect, the con-

(a) Cro. Car. 292.

clusion from the context must be irresistible. It is not so here. The words of the clause creating the charge afford no such irresistible inference. They are mere general words used by the testator in ignorance of the precise nature of his own title. The strict technical meaning of "real estate" being well known, as also that of "personal estate," are you to deduct from the gift of personal estate and add to the gift of real estate, upon an inference drawn from words so vague? We submit not. In the cases cited, there were particular words or limitations which were relied upon, but which are not to be found in the present case. In *Thompson v. Lawley*, (a) referred to on the other side, the leaseholds were held not to pass. Lord ELDON there said: "Whether the rule laid down in *Rose v. Bartlett* were wisely adopted or not, it is unnecessary for us to determine; but that case having once established a general rule, I had rather consent pointedly and avowedly to contradict that rule in terms than to acknowledge it in words and deny it in effect, by raising distinctions which in fact make it impossible for any man to decide in any particular case what is the legal construction of a will as to this point, till he has obtained the authority of a Court of Law in a judgment upon the will for the opinion which he gives. I observe that the rule has not been denied in any of the cases which have followed *Rose v. Bartlett*."

* 168 "No doubt those who decided the cases in which the general rule has been held not to apply, were satisfied that the circumstances before them were sufficient to warrant the exception, and that the exception could be taken with safety to the rules of property; but it is enough for me to say that none of the circumstances relied on in those cases are to be found in this. I cannot help adding, that if the principle be just, that we are not to conjecture but to expound, it does appear to me that we do not strictly abide by the rule, that we indulge in what is rather conjecture than exposition, if we are to proceed on suppositions of what the testator may be imagined to have understood as to the nature of his own property, of what he forgot and of what he remembered concerning it; suppositions not founded in his acts or expressions." In *Lane v. Stanhope*, (b) the expression was "farms," and not "real estate." *Doe v. Lucan* (c) turned on a similar expression. *Hobson v. Blackburn* (d) on the word "appur-

(a) 2 Bos. & Pul. 303.

(c) 9 East. 448.

(b) 6 T. R. 345.

(d) 1 Myl. & K. 571.

tenances." In *Hartley v. Hurle* (a) there were not only words applying to both species of property, but there was an express declaration that the property was subject to ground-rents. *Addis v. Clement* (b) was, according to Lord ELDON's opinion in *Thompson v. Lawley*, irreconcilable with *Pistol v. Riccardson* (c) and Lord ELDON preferred *Pistol v. Riccardson*. On the general scope of the will, or the disposition or the value of the personalty, there is nothing to demonstrate that the testator intended by "real estate" any thing but what the law has defined to be such. It is not possible to say that the testator did not suppose the freehold estate to be sufficient to meet the charges. Indeed, the scope of the will shows that he knew what the law required to be done by him to enable the trustees * to deal with the freehold estate. * 169 We must assume the testator to have known that the will would operate on real estate only at its date, and yet would operate on the personal estate at the date of his death. The direction as to the payment of the testator's debts throws no light on the point, but the whole will shows the testator to have known that it was not necessary to give any particular power to sell a personal estate, but that it was necessary as to real estate. He knew that he must devise real estate and give a power of sale with respect to it, and that the law would not imply either of these dispositions. The freeholds, in this case, produced on sale 520*l*. They were not, therefore, inadequate to provide for the charge of the legacies.

Then as to the question of costs. The rule is, that when a party comes in, *pro interesse suo*, under a decree, he does so at his own risk. The statement that the costs of making out the pedigree of the heiress-at-law were incurred for the benefit of the parties to the record is not, we submit, substantiated. There was no necessity for proving her pedigree.

[THE LORD CHANCELLOR. — Was it not necessary that the heiress-at-law should be present as a party?]

All the costs the heiress-at-law can be entitled to are those only which have been incurred in the chief clerk's office; not the costs incurred out of doors in collecting information as to her pedigree, *i.e.*, not the costs of private inquiry, but the costs only of proceedings in the suit. *Shuttleworth v. Howarth*. (d)

(a) 5 Ves. 540.

(c) 1 H. Bl. 26, n.

(b) 2 P. Wms. 459.

(d) Cr. & Ph. 228.

Mr. Elmsley, in reply. — The old rule that when a party came in, *pro interesse suo*, under the decree, he was only allowed his costs incurred within the office, not those incurred out of the office, is * now no longer applicable. The practice now is, under the recent statutes, to serve all parties interested with notice of the decree. It is submitted, therefore, that the decree of the Master of the Rolls should be varied, by the introduction of a declaration, that the devise in the testator's will of his real estate, &c., passed his leasehold property, and that the costs of the heiress-at-law of proving her pedigree ought not to be excluded from her general costs.

Judgment reserved.

December 12.

THE LORD CHANCELLOR. — After a very attentive consideration of this case, and an examination of all the authorities referred to in the argument, I am bound to say that I cannot assent to the decree appealed against. The question is, whether the testator, Thomas Lindley, by his will, dated 17th August, 1833, charged two legacies of 200*l.* each upon certain leasehold as well as freehold lands, which belonged to him, or on the freehold only? And this depends upon whether the leasehold passed under the first limitation of the will, whereby he gave and devised all his real estate lying and being within Foxup, in the township of Halton Gill, to Thomas Farnhill and Joseph Stocks, to have and to hold unto them and the survivor of them “for ever or otherwise, according to the several and respective natures and tenures thereof, in trust,” &c.

The will being made before the Wills Act, 7 Will. 4 & 1 Vict. c. 26, the construction of it cannot be affected by the 26th * 171 section of that Act. In construing it, we * must be governed by the rule laid down in *Rose v. Bartlett*, (a) and often recognized since, although this rule should defeat what may reasonably be supposed to have been the intention of the testator. “If a man hath lands in fee-simple, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years.”

(a) Cro. Car. 292.

In the present case, regard being had to facts which existed when the will was made, and which may be legitimately taken into consideration in construing it; and regard being had to the language of the will, I think that, irrespective of the words mainly relied upon by the appellant, "or otherwise according to the several and respective natures and tenures thereof," there is strong ground for inferring that the testator intended the leasehold to pass along with the freehold under the gift to the trustees of "all his real estate." In addition to the authorities cited in the argument, we have the opinion of the Judges of the Court of Queen's Bench, in *Wilson v. Eden*, (a) that in trying to discover the intention of the testator on such a subject, the Court may consider the comparative value of the freehold and the leasehold lands, their contiguity or situation, so as to be conveniently occupied together, the unity of occupation, and the fact of the whole having been let to the same tenant at a joint rent. The will in *Wilson v. Eden* had been made after the Wills Act came into operation, so that the decision as to the effect of the limitation in the will is not in point: but there the Court, under the 26th section of the Act, had to say, before giving effect to the new rule laid down by the legislature as to a general devise of land passing leaseholds, whether a contrary intention was manifested by the testator.

* In the present case we must consider that the freehold * 172 was of very small value; that, if let separately, the rent would not be sufficient to pay the interest of the legacies; that the leaseholds were of much greater value; that they were for so very long a term, as to approach in duration to a fee-simple tenure, and were of much more valuable tenure than common leases for lives which are treated as in strictness "real estate;" that before and at the time of making the will, the freehold and leaseholds were let to the same tenant at a joint rent; and that, if not actually contiguous, they lay so near to each other that they might be conveniently occupied together.

The testator having these lands, and these only, I can entertain little doubt that he thought that the whole formed his "real estate," and that he intended the whole to be sold to his trustees, subject to and chargeable with the legacies. There is nothing in the first limitation inconsistent with the leasehold being included; and

(a) 18 Q. B. 474.

when the testator comes afterwards to dispose of what he calls his "personal estate," there is nothing to indicate that he considered his leasehold lands to be included in his personal estate, or in the slightest degree inconsistent with the supposition that he believed them to be part of his real estate. He evidently intended the whole of his property to be converted into money, and, except as part of the "real estate," there is no direction to sell the leasehold land. Again, having directed his debts, funeral expenses, and the probate of his will to be paid out of his personal estate, "if the same will extend so far," he directs "the deficiency to be paid out of the rents, issues, and profits of his real estate." Is this more consistent with the notion that the leasehold was to be treated as part of his personal or as part of his real estate? If as part of the personal estate, there could hardly have been any deficiency; * 173 and if there had been any, the freehold, * by itself, charged exclusively with the legacies, would have been a very poor resource.

However strong the inference may be, from circumstances and from the general scope of the will, of the intention of the testator to include the leasehold as part of his real estate; yet, according to the rule by which we must be governed, effect cannot be given to this intention, unless there be specific words in the will which clearly show that the leasehold was to be included as well as the freehold. *Mr. Elmsley* fairly admitted that although leases are chattels real, a devise by a testator of "all his real estate" must, till the contrary is shown by other words in the will, be confined to freehold as much as a devise of "all his lands and tenements." But it cannot be denied, after *Addis v. Clement*, (a) *Turner v. Husler*, (b) and *Lane v. The Earl of Stanhope*, (c) that there may be such words, and this was fully conceded by Lord ELDON, in his celebrated judgment in *Thompson v. Lady Lawley*. (d)

Now, in the will of Thomas Lindley, I find specific words which to my mind clearly indicate that by "real estate" he meant something to pass beyond his fee-simple land: viz., the leasehold property to which he was entitled for a very long term. After the *habendum* to the trustees and the survivor of them for ever, follow the words, "or otherwise, according to the several and respective

(a) 2 P. Wms. 459.

(c) 6 T. R. 345.

(b) 1 Bro. C. C. 79.

(d) 2 Bos. & Pul. 303.

natures and tenures thereof." Those words cannot be struck out of the will. They are not insensible. Some force must be given to them. In my opinion they clearly intimate that the testator considered his real estate not to be homogeneous, but to be of different tenures and natures. It is most important that these last substantives *are in the plural, as thereby the *174 argument is answered that he had in contemplation to devise only that which, in strictness, he held in fee-simple, and that he might be doubtful whether it was freehold or copyhold, or gavel-kind, or borough-English, or of burgage tenure. An illiterate man might be puzzled as to the nature and tenure of his interest in land which he was entitled to enjoy for 2,000 years, minus the number of years which have elapsed since the twentieth year of the reign of Charles II. But he shows that beyond his fee-simple land, he held other land of a different nature and tenure. This could only be the leasehold property in question ; this he declares to be part of his " real estate ;" this he devises to the trustees to be sold ; and all that he so devises he charges with the two legacies.

I am therefore of opinion that the decree of the Master of the Rolls ought to be reversed, and that there ought to be a declaration in favour of the appellant, the heir-at-law, that the legacies were charged on the freehold and leasehold lands jointly.

With respect to costs, the decree to be varied by allowing the appellant the costs of making out and proving the pedigree as heir-at-law.

*BILL v. THE SIERRA NEVADA LAKE WATER *177
AND MINING COMPANY.

1859. December 14. Before the LORDS JUSTICES.

A company was formed in California for purposes connected with land in that country, but nearly all the shareholders were resident in England. A resolution was passed at a meeting of English shareholders, authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company. It appearing that there was no intention to create preference shares, except with the sanction of the Californian legislature : *Held*, that an injunction ought not to be granted to

restrain the company from acting on the resolution, for that the Court will not in general restrain parties from applying to the legislature, whether of this or of a foreign country.¹

THIS was a motion by the defendants to discharge an order of Vice-Chancellor STUART, granting an injunction to restrain the defendants the company and their officers from increasing or attempting to increase the number of class A shares in the company beyond 5000, and from paying or authorizing or sanctioning the payment of any preferential dividend on any but the 5000 shares, and from in any manner acting upon or carrying into effect a resolution of the 28th of October, 1859.

The company was incorporated in 1854 by an Act of the Californian legislature, its principal object being the conveyance of water by an aqueduct from Truckey Lake to Forest City, and other places in California. By the Act of incorporation it was provided that the company might, whenever it was desired to increase or diminish the capital, call a meeting of the shareholders by a notice signed by at least a majority of the trustees, and published for at least four weeks in some newspaper of the county where the principal place of business was situate, which notice was to specify the object of the meeting, the time and place at which it was to be held, and the amount to which it was proposed to increase or diminish the capital, and a vote of two-thirds of the shareholders in amount was to be necessary to authorize such increase.

* 178 * The certificate of incorporation, dated the 24th of

August, 1854, stated the objects of the company, and provided that its capital should be 2,000,000 dollars, divided into 20,000 shares, that the company should continue for fifty years, unless sooner dissolved under the provisions of the law, that the number of trustees should be in the first instance three, and that the principal place of business should be at Downieville in Sierra County, California.

The shares were chiefly taken by English capitalists, and the company took an office in Tokenhouse Yard, London, where its affairs were in reality principally carried on. The capital was some time after the foundation of the company legally diminished to 1,000,000 dollars in 10,000 shares.

¹ See *Heathcote v. The North Staffordshire Railway Co.*, 2 Mac. & G. 100, 109, note (2), and cases cited; 2 Dan. Ch. Pr. (4th Am. ed.) 1620, and note (1); *Kerr Inj.* 458; *Greenville v. Seymour*, 7 C. E. Green (N. J.), 458.

By an agreement dated the 17th of April, 1856, made between all the then shareholders in the company it was agreed that the 10,000 shares should be divided into two classes, class A and class C, each consisting of 5000 shares, and that the owners of class A shares should be entitled to a preferential dividend of 20% per cent., and that when the profits were sufficient to pay the same dividend to the C shareholders, the surplus should be divided equally.

This agreement was acted upon. Shortly afterwards by-laws were made, providing, among other things, for the election by the shareholders of a committee to manage the business in London.

In June, 1857, the plaintiff became a shareholder in the company by purchasing thirty-five of the class C shares.

On the 1st of June, 1859, at a meeting of the company, * a resolution was passed for converting 800 C shares into A * 179 shares. The plaintiff filed a bill for an injunction to prevent the company from carrying this resolution into effect. The injunction was granted in the same month, and nothing further was done upon that resolution.

At the half-yearly meeting of shareholders, held in London on the 28th of October, 1859, the following resolution was passed:—

“It appearing that the balance of outlay to Forest City, including the Rudyard Reservoir, has exceeded the original estimate of Mr. Romaine by 7000£., to which the five extra miles of canal and branches have to be added, besides the costs of the Camptonville Extension, amounting to 12,000£., and that the conversion of the company's C shares has been a failure, and that no addition has been made to the capital to cover the deficiency, it was then resolved that the directors be authorized to take the necessary steps abroad for increasing the A capital by a sum not exceeding 30,000£., so as to perfect the works, satisfy the shareholders who are wanting shares for their advances, and discharge the remaining obligations of the company.”

The bill was filed by the plaintiff on behalf of himself and all the other shareholders in class C. except such of them as were defendants; and it alleged that the directors intended to act on the resolution, and issue new preference shares.

The plaintiff moved for an injunction. From the affidavits in

opposition it appeared that the defendants had no intention of attempting to issue new preference shares merely by force of the resolution, but that in pursuance of it instructions had been
 * 180 sent out to take * steps to procure an Act of the Californian legislature, sanctioning an increase of the number of A shares.

The Vice-Chancellor granted the injunction as prayed, and the defendants appealed.

Mr. Bacon and *Mr. Rodwell*, for the appellants. — We submit that the Court has no jurisdiction to make such an order as has been made by the Vice-Chancellor, the company being a foreign company dealing only with immovable property situate abroad; and the appearance of the company, though it would waive a mere irregularity, does not create jurisdiction.

[THE LORD JUSTICE TURNER. — Suppose all the capital to have been subscribed here, do you say that the Court would not have jurisdiction to prevent the application of it to purposes not authorized by the constitution of the company?]

We do not dispute that the Court might do that, but we say that this is a company constituted according to foreign law, having its principal place of business abroad, and formed for carrying out an undertaking in the same country, and that the Court has no jurisdiction to restrain such a company from applying to the legislature of the country in which it is domiciled for a variation in the terms of its constitution. This is like a bill to restrain an application to Parliament — a relief which this Court is not in the habit of granting — and there is no difference in principle between the ordinary case of an application to our Parliament, and the case of an application to the Californian legislature on behalf of a company circumstanced as this is. The case is very like *Stevens v. South Devon Railway Company*. (a)

Mr. Surrage (*Mr. Malins* with him,) for the plaintiff. —
 * 181 * The question of jurisdiction is settled by the acquiescence of the company in the former injunction. The company is for all practical purposes an English company. The governing

(a) 13 Beav. 48.

body is here, almost all the shareholders are here, and almost all the important business of the company is transacted here. To increase the preferential capital is a step not authorized by the by-laws or by the Act of incorporation.

[THE LORD JUSTICE TURNER. — Could not the Californian legislature authorize it?]

If it does so we must submit; we shall be content with an injunction restraining the company from increasing the A capital without legislative sanction. The resolution proceeds on the footing that the company can do the act without any other authority.

Mr. Bacon, in reply. — The evidence plainly shows that there is not and was not when the bill was filed any intention to increase the A capital without first obtaining legal powers of doing so. An injunction might be granted against applying the common funds for that purpose, if the company were about to do so, and the bill were properly framed; but the bill makes no case of that nature, nor would the facts support such a case, for there are no such funds, and the expenses can only be met by a subscription. The relief sought is simply to restrain an application to the legislature, and this the Court will not do. *Ware v. Grand Junction Waterworks Company*. (a)

THE LORD JUSTICE KNIGHT BRUCE. — The domicil, purpose, and objects of the Sierra Nevada Company are such that in my judgment the Court ought not to act against the defendants for the purpose of * injunction in such a case as the present, at * 182 least on an interlocutory application. I think that the injunction and order should be discharged, and the costs before the Vice-Chancellor and here be made costs in the cause.

THE LORD JUSTICE TURNER. — On the opening of this case I thought it might involve questions of considerable importance, but after having heard the argument I do not think that it does. I do not consider it necessary to enter into the question of jurisdiction or into the question as to the power of the shareholders in this country to direct the trustees to do an act not authorized by the

powers vested in the trustees. All that the shareholders here professed to authorize to be done is that the directors shall take the necessary steps for increasing the A capital to an extent not exceeding 30,000*l*. Now the necessary steps to be taken must be steps to be taken through the medium of the legislature of California, or through the medium of the trustees in California. It is not suggested that any proceeding by the trustees in California could enable the act to be done which is sought to be prohibited ; indeed the plaintiff's argument is that, though the Act of the Californian legislature gives power to increase the capital, it does not give power to increase it for the benefit of one class of shareholders at the expense of another. His case is, that they cannot do the act, and the evidence shows that they do not intend to do it otherwise than by means of an application to the Californian legislature. The case therefore which we have to consider is, whether there is any equity upon this bill to restrain the trustees from applying to the Californian legislature to enable them to carry out what has been resolved upon, and I cannot see any.

* 183 * It is not the habit of this Court to restrain persons from applying to the legislature of this country, and that being so, I do not see any principle which can justify the Court in interfering to restrain them from applying to the legislature of a foreign country. It is said that they ought not to be allowed to do so at the expense of the company. I agree there may be an equity to restrain them from applying the funds of the company in defraying the expenses of the intended application, but there is no such case before us. If the plaintiff meant to raise this question, he should have amended his bill when he found that the intention was to apply to the Californian legislature, and sought for an injunction to restrain the trustees from such an application of the funds. I am of opinion that the injunction should be dissolved, and the costs in both Courts be made costs in the cause.

JOHNSTONE v. THE EARL OF HARROWBY.

1859. December 7, 14. Before the Lord Chancellor Lord CAMPBELL.

Legacy given *simpliciter* by a codicil to a legatee to whom another legacy was given by a prior codicil, held to be cumulative and payable out of the same funds and upon the same conditions, including exemption from legacy duty.¹

THIS was the appeal of the plaintiffs from the decision of Vice-Chancellor Sir W. P. WOOD, upon a special case. The hearing before the Vice-Chancellor is reported in Mr. Johnson's reports. (a)

The facts stated upon the special case were the following:—

The late Lord Dudley Stuart, shortly after the execution of his will bearing date the 26th of November, 1853, by a codicil thereto without date made the following bequest:—

“I hereby bequeath out of my ready money in my *bankers' hands, money invested in the public funds, and *184 other my personal estate not consisting of an estate, interest, charge, or incumbrance upon lands or hereditaments within the meaning of the statute 9 Geo. 2, c. 36, the sum of 500*l.* to the Literary Association of the Friends of Poland, the said sum to form part of the ordinary funds of the said society, and to be applied accordingly at the discretion of the council thereof.”

The testator died at Stockholm on the 17th of November, 1854, having executed a second codicil to his will bearing date the day of his death, whereby he made the following bequest:—

“I give and bequeath to the Literary Association of the Friends of Poland in London the sum of 1000*l.*”

The testator's estate at his death consisted of an amount of pure personalty more than sufficient to pay his debts and legacies, includ-

(a) Page 425.

¹ See 1 Jarman Wills (3d Eng. ed.), 171-173; *Wilson v. O'Leary*, L. R. 12 Eq. 525; *Russell v. Dickson*, 1 Dr. & War. 138; *Warwick v. Hawkins*, 5 De G. & S. 481; *King v. Tootel*, 25 Beav. 23; *Cator v. Cator*, 14 Beav. 463; *Burrell v. Earl of Egremont*, 7 Beav. 223; *Cresswell v. Cresswell*, L. R. 6 Eq. 69.

ing the above bequests to the Literary Association of the Friends of Poland, and of a considerable amount of money on mortgage and other mixed personalty.

The questions submitted upon the special case for the consideration of the Court were :—

1. Whether the legacy of 1000*l.* given by the second codicil was cumulative, or substitutional, for the legacy of 500*l.* bequeathed by the first codicil.

2. If the legacy of 1000*l.* was cumulative, whether it was payable out of the same fund as the legacy of 500*l.* was directed to be paid out of ; or, if not, then out of what funds, and in what proportion, and to what amount in the whole.

* 185 * The plaintiffs were certain members of the council of the Literary Association of the Friends of Poland ; the defendants, the executors of the testator.

The answer of the Vice-Chancellor to the questions was that the legacy of 1000*l.* given by the second codicil was cumulative ; but was not payable out of the fund out of which the legacy of 500*l.* was directed to be paid, but out of the testator's general personal estate ; and that it must therefore abate according to the proportion that the mixed bore to the pure personalty.

A third question not submitted expressly by the special case was raised in the course of the argument upon the appeal, viz., whether, as the legacy of 500*l.* was expressly given by the first codicil clear of legacy duty, the second legacy was also exempt from legacy duty. This question the Lord Chancellor consented also to hear and determine, all parties to the special case joining in a request that he would determine it, and undertaking to amend the special case so as expressly to embrace the question.

Mr. G. M. Giffard and *Mr. E. Beales*, for the plaintiff, in support of the appeal. — There cannot be a doubt that the bequest of 1000*l.* given by the second codicil in this case is cumulative, though given *simpliciter* without any words of addition. The rule upon this subject is well expressed by Sir JOHN LEACH, in *Hurst v. Beach*, (a) where, speaking of the presumption against the intention of a double gift, he says : “ The Court raises this presumption

(a) 5 Madd. 351.

only where the double coincidence occurs of the same motive, and the same sum, in both instruments. It will not raise it * if in either instrument there be no motive, or a different * 186 motive, expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different." In the instruments in the present case no motive is expressed, and the gifts differ largely in amount. The Court will not hold that a bequest in a will is revoked by a codicil; unless the intention to revoke is perfectly clear. We submit that the second legacy is payable also out of the same funds as the first. Upon that point the Vice-Chancellor, in his judgment, drew a distinction between cases in which the second gift has been a gift *simpliciter* and those in which it has been accompanied by express words of cumulation or addition. But why are we at liberty to infer from the mere omission of express words of accretion, that the testator's intention expressed as to the first legacy does not continue as regards the second? It has been more than once held that legacies given *simpliciter* without words of accretion to a prior legacy, and legacies given expressly in addition to a prior legacy stand on precisely the same footing. *Suisse v. Lord Lowther*, (a) *Lee v. Pain*. (b) The cases relied upon by the Vice-Chancellor as establishing the distinction upon which he went were *Leacroft v. Maynard*, (c) *Crowder v. Clowes*, (d) *Day v. Croft*. (e) But in *Leacroft v. Maynard*, the words "in addition to" did not occur, the second legacy being given *simpliciter*, and the decision was that the second legacy was payable out of the same fund as the first. That is clearly therefore an authority in our favour, and we submit that the principle upon which the decision in that case was founded also governs the present; viz., that the testator, when he bequeathed a second legacy *simpliciter* to the same * society, must be presumed to have * 187 intended to introduce into the second gift the condition of payment out of the fund designated by the first codicil. In *Crowder v. Clowes*, (d) and *Day v. Croft*, (e) the words "in addition to" were no doubt used, but the judgments in those cases afford no ground for inferring that if the words "in addition to" had not been expressed, the Court would not still have held the second

(a) 2 Hare, 424.

(b) 4 Hare, 218.

(c) 1 Ves., Jr., 279; S. C. 3 Bro. C. C. 233.

(d) 2 Ves., Jr. 449.

(e) 4 Beav. 561.

gifts to have been in addition to the first, and attended with the same incidents. Independently of the authorities there can be but little doubt that what the testator here meant was to increase the legacy first given by the total amount of the second gift, and consequently that it should be raisable out of the same funds, which was the only way in which that intention could be effectuated. Without calling upon the Court to lay down an abstract rule, that, wherever a second legacy is given to a legatee it is to be attended with the same incidents as the first bequest to him, it is submitted that there is an intention on the part of the testator, apparent upon the instruments in this case, that the 1500*l.*, the aggregate amount of the two legacies, is to be raised out of the funds indicated in the first codicil. If that intention be acted upon it will follow of course that both legacies will be equally free from legacy duty, that being one of the incidents attached by the first codicil to the legacy of 500*l.* The point has also been more than once so ruled by authority. *Cooper v. Day*, (a) *The Earl of Shaftesbury v. The Duke of Marlborough*. (b)

Mr. Daniel and *Mr. Prendergast*, in support of the Vice-Chancellor's decision. — The proposition that the second legacy is also free from legacy duty cannot be supported. The first legacy
 * 188 * is a demonstrative legacy, and the second merely a general one. Their incidents cannot therefore be the same. Suppose the first legacy had been of "500*l.* out of my stock in the funds," and the second "of 1000*l.*," and the testator had died possessed of only 500*l.* stock in the funds, but leaving other assets amply sufficient to provide for both legacies: could it be said that the second gift must fail because, being cumulative, it is attended with the same incidents as the first? The fallacy in the argument on the other side is in applying to a legacy held to be cumulative by implication of law every incident that has been held to apply to legacies cumulative by force of the expressions used in the bequest. The rules applicable to the two descriptions of cumulative bequests are not necessarily the same. The effect of the words "in addition to" is for instance to agglomerate the two legacies into one lump sum, for which one receipt only would be necessary in an administration suit, whereas the gift of a second legacy *simpliciter* without more is in effect a bequest of a second distinct legacy, not a mere

(a) 3 Meriv. 154.

(b) 7 Sim. 237.

enlargement of the first, and in respect of that a second receipt would be required. If we are to speculate on what may have been the testator's intention, the probability is that he intended to give only the 1000*l.*; and that, being *in extremis* when he made the second codicil, he had forgotten the first bequest. A second legacy, given expressly in addition to a prior legacy, means something more than a legacy merely cumulative by inference of law. It is submitted that the decision below is the right one, and that the effect of a different decision would be to supersede the authorities upon the subject, and to attach by force of law in every case the same incidents to legacies simply cumulative as those which have been decided to belong to legacies given expressly in addition.

* *Mr. G. M. Giffard*, in reply. — Where a legacy given ** 189 simpliciter* is cumulative, and full effect can be given to the second only by holding it to be subject to the same incidents as the first, there, the necessary inference from the instruments being that the testator's intention when he gave the first legacy continued when he gave the second, the irresistible implication is that the second legacy was intended to be subject to all the incidents of the first.

They cited also *Hooley v. Hatton*, (a) *Cookson v. Hancock*, (b) *Mann v. Fuller*, (c) *Russell v. Dixon*. (d)

Judgment reserved.

December 14.

THE LORD CHANCELLOR. — Although in this special case a question is put, whether the legacy of 1000*l.* given by the second codicil is cumulative, or substitutional for the legacy of 500*l.* given by the first codicil, — both sides now very properly agree that it is cumulative which it clearly is according to the intention of the testator and according to all the authorities.

The great question debated before me was “whether the legacy of 1000*l.* is payable out of the same fund out of which the legacy of 500*l.* is payable?” or, in other words, whether the precaution

(a) 1 Bro. C. C. 390, n.; S. C., 2 Dick. 461.

(b) 1 Keen, 817; S. C., 2 Myl. & Cr. 606.

(c) *Kay*, 624.

(d) 4 H. L. Cas. 293.

expressly and anxiously taken by the testator in the first
 * 190 codicil to guard against * the Mortmain Act, so that the
 bequest should be effectual, is sufficient to protect the second
 legacy from the operation of that Act.

Upon this question, after great consideration, and with great
 reluctance, I differ in opinion from Vice-Chancellor Sir W. PAGE
 WOOD.

The intention of the testator, I think, must have been that both
 legacies should be subject to the same incidents. When he made
 the first codicil, in the end of 1853, or the beginning of 1854, he
 was well aware of the Mortmain Act, and he expressly refers to it,
 with the view that the charity which was the object of his bounty
 should have the full benefit of the legacy. When he made the cod-
 icil of the 17th of February, 1854, leaving an additional sum to the
 same charity *simpliciter*, as he must have been still aware of the
 Mortmain Act, he could not mean to violate its provisions and
 profess to confer a further benefit on the charity which might be
 almost illusory. Although he does not repeat the words, he must
 have meant that the 1000*l.* "should form part of the ordinary
 funds of the said society, and should be applied accordingly at the
 discretion of the council thereof." He might reasonably suppose
 that it was unnecessary to reiterate these directions, as the 500*l.*
 and the 1000*l.* of necessity were to form one fund; and he might
 reasonably suppose that the conjoint fund would be subject to the
 same incidents.

I am bound to say that the authorities appear to me in accord-
 ance with this intention. Since the case of *Leacroft v. May-*
nard, (a) decided by Lord THURLOW, the rule has prevailed
 * 191 as laid down by Lord ALVANLEY, M. R., * in the subsequent
 case of *Crowder v. Clowes*, (b) "that substituted and added
 legacies shall be raised out of the same fund and subject to the
 same conditions." Added legacies are put on the same foot-
 ing as substituted legacies; and the test proposed is, whether
 the second legacies really are in point of law and in effect substi-
 tuted or added, — not whether they are declared to be so by the
 codicil bequeathing them.

In the present case it is admitted that the legacy of 1000*l.* is in
 point of law and in effect cumulative, or "given in addition to the

(a) 3 Bro. C. C. 233; S. C., 1 Ves., Jr. 279.

(b) 2 Ves., Jr. 449.

legacy of 500*l*.” The distinction taken between this case and the cases relied upon by the appellants is, that in those cases the codicil contains the words “in addition to my former legacy,” or words equivalent; whereas here no words are used expressly to connect the two legacies. During the argument, the counsel for the respondents contended that if in the second codicil the testator had inserted the words “in addition to the sum of 500*l*,” I bequeath to the society the sum of 1000*l*.; or, without the words “in addition to the sum of 500*l*,” he had said “I bequeath to the society the further sum of 1000*l*,” the general rule would have prevailed, and both would have been subject to the same incidents. But the law declares the second legacy to be cumulative — or added to the first — and there is no necessity to express what the law implies and declares. “*Expressio eorum quæ tacitè insunt nil operatur.*” The respondent’s counsel insisted that to make the second legacy subject to the same incidents as the first, it is necessary that the codicil giving the second legacy should have some words evidencing the intention of blending the two funds. But here the two funds must evidently be blended together, as they go to the same *persons and for the same purposes; and there *192 could hardly be a necessity to express an intention that what is known to be inevitable shall come to pass.

For these reasons, which do not require an analysis of the various authorities cited at the bar, I am of opinion that the decree of the Vice-Chancellor on this point must be reversed, and that there must be a declaration that the legacy of 1000*l*. is payable out of the same fund out of which the legacy of 500*l*. is payable.

At the close of the argument a question was stated which is not raised by the special case, whether the legacy of 1000*l*. is, like the legacy of 500*l*., to be paid without deduction for the legacy duty; and both parties expressed a wish that I should give my opinion upon this question, to which I agreed, the case being amended to embrace it.

Had this point been entirely new I might have entertained a doubt about it, — on the ground that the deduction or non-deduction of the legacy duty may be considered referable to the amount of the sum bequeathed; as allowing the legacy duty to the legatee is in effect the bequest of an equivalent sum, plus the nominal amount of the legacy. But in the *Earl of Shaftesbury v. Duke of*

Marlborough, (a) it was decided that, where there has been a substitution, the substituted legacy has impliedly the incident of being free from legacy duty which was expressly given to the original legacy; and, as substituted and added legacies have been hitherto placed in this respect on the same footing, I think it better to make no distinction between them, and to declare that the added 1000*l.* legacy is payable without deduction for legacy duty.

1859. November 23, 24. December 19. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A policy was effected with an assurance company carrying on business both in Edinburgh and London, and after the death of the insured, the insurance money was claimed on the one hand by a mortgagee in England, and on the other by a trustee under a Scotch sequestration. The trustee raised an action of "count and reckoning" in the Court of Session in Scotland, and the mortgagee instituted a suit in the Court of Chancery in England, each of them being a party to the litigation commenced by the other. An order was made in the suit for payment of the policy-moneys into Court, without prejudice to letters of arrestment which had issued in Scotland. By the decree in the suit an account was directed of what was due to the mortgagee on his securities, and he was declared entitled to a lien on the policy-moneys for what should be so found due. The trustee attended before the chief clerk on the taking of the accounts, and on further consideration the moneys in Court were ordered to be paid to the mortgagee. *Held*, on appeals by the trustee, from the interlocutory order and decrees, that the appeals ought to be dismissed, the Lord Chancellor holding that the appellant had acquiesced in the decrees by attending before the chief clerk, and the Lords Justices holding (*dissentiente* the Lord Chancellor) that the circumstance of the action in Scotland having been brought to an issue before the commencement of the suit in this Court, was not a ground for refusing to make the order and decrees under appeal.¹

(a) 7 Sim. 237.

¹ See Story Conf. Laws (7th ed.), § 610 a; *Goodall v. Marshall*, 11 N. H. 99; *Bowne v. Joy*, 9 John. 221; *Smith v. Lathrop*, 44 Penn. St. 326; *Hatch v. Spofford*, 22 Conn. 485; *Cox v. Mitchell*, 7 C. B. N. S. 55; *Scott v. Seymour*, 1 H. & C. 219; *Colt v. Partridge*, 7 Met. 574; *Merrill v. New England Insurance Co.*, 103 Mass. 249; *Wallace v. McConnell*, 13 Peters, 136; *Whipple v. Robbins*, 97 Mass. 107; *American Bank v. Rollins*, 99 Mass. 313.

THIS case came before the Court upon two separate appeals by the two defendants to the suit, from an order made before decree for payment of the fund in dispute into Court, from the decree at the hearing, and from the order on further consideration made by Vice-Chancellor WOOD in the cause.

The short facts are extracted from the judgment of the Lord Justice TURNER.

Walter Charles Venning, the plaintiff in the suit, was and had for several years been a solicitor carrying on business in London, in partnership with Messrs. Naylor and Robins. For some years previous to the 24th of October, 1854, the plaintiff, Walter Charles Venning, from time to time made advances of money to Robert Henderson Robertson, a merchant, also carrying on business in London, and Robert Henderson Robertson also from time to time became indebted to the plaintiff's firm for professional business transacted by them for him.

* By an indenture dated the 7th of January 1851, executed in this country, and made between the said Robert Henderson Robertson, therein described as of Lothbury, in the city of London, merchant, of the one part, and the plaintiff of the other part, Robert Henderson Robertson assigned to the plaintiff a policy of insurance which he had effected in the Scottish Widows' Fund and Life Assurance Society, for the sum of 5000*l.*, payable within three months after proof of his death; and other securities were given by Robert Henderson Robertson to the plaintiff, as to which no question arose in the suit. * 194

On the 27th of January, 1851, the plaintiff gave notice to the insurance office of the assignment to him of the 5000*l.* policy. This assignment, although absolute on the face of it, was in fact made to secure to the plaintiff the amount then due to him; but before the 24th of October, 1854, the security had been extended by subsequent instruments, all of which were also executed in England, to cover the plaintiff's subsequent advances, and also what was due to the plaintiff's firm for the business transacted by them on Robertson's account.

The Scottish Widows' Fund and Life Assurance Society, in which the policy for 5000*l.* was effected, was an insurance office carrying on business both in Edinburgh and London, and empowered by Act of Parliament to sue and be sued in the names of its trustees, in all Courts in any part of the United Kingdom or else-

where. Robert Henderson Robertson had formerly carried on some business in Scotland, and on the 24th of October, 1854, his estate was sequestered according to the law of Scotland; and David M'Cubbin, an accountant at Glasgow, one of the defendants in the suit, was appointed trustee of the sequestered estate.

* 195 * On the 22d of August, 1857, Robert Henderson Robertson died; and on the 4th of September, 1857, the defendant David M'Cubbin raised an action of "count and reckoning," in the Court of Session in Scotland, against the plaintiff Walter Charles Venning, in effect, for an account of the estate of Robertson possessed by him, and of his dealings therewith, and payment of the balance which might be due from him on the account. In this action the defendant M'Cubbin, on the 4th of September, 1857, laid an arrestment *jurisdictionis fundandæ causæ* on the moneys assured by the 5000*l.* policy in the hands of the Scottish Widows' Fund and Life Assurance Society, and afterwards, on the 7th of September, 1857, he laid a further arrestment on those moneys in the hands of the assurance society until security should be given to answer his claim in the action.

The moneys coming due upon the policy having been thus arrested in the Scotch suit, the plaintiff Walter Charles Venning appeared in that suit, and a condescendence having been exhibited, he put in his answer thereto, but before putting in the answer, and on the 2d of February, 1858, he filed the bill in this suit against the trustees of the assurance society and David M'Cubbin; and in his answer to the condescendence, by which he claimed a very large balance to be due to him, he stated the filing of his bill, and that his claim had been thereby brought under the cognizance of this Court. He pleaded, amongst other things, that he was not bound to account except according to the law and practice of England; and that the action ought to be sisted until the issue of the proceedings in this Court. The Scotch suit was still pending; but no decree or sentence had yet been pronounced on it. It was stated only to have reached the stage of a revised condescendence.

* 196 * The plaintiff, by his bill in this cause, prayed payment of the moneys assured by the policy, and the defendant, M'Cubbin, appeared to the bill. By an order made in the cause, bearing date the 21st of April, 1858, and which was made upon a motion on which the defendant M'Cubbin appeared, it was ordered

that the defendants, the trustees of the assurance company, should pay into Court 5375*l.* 6*s.* 10*d.*, the balance of the moneys due upon the policy, to the account of the trustees, subject to the further order of the Court, but that such payment should be without prejudice in any manner to the Scotch letters of arrestment, and the execution thereof, and it was ordered that the moneys, when so paid in, should not be paid out or disposed of without notice to the plaintiff, and to the defendant M'Cubbin. This order was made upon an affidavit of the plaintiff which contained, amongst others, the following paragraphs:—

Paragraph 2, "I acted as the attorney and solicitor of Robert Henderson Robertson in the bill in this cause mentioned, from the year 1841, down to a short time preceding the date of his decease in 1857; during the whole of that time he resided with his family in or near London."

Paragraph 7, "The said policy of insurance on the life of Robert Henderson Robertson, in the bill in this cause mentioned, as I have been informed by a clerk of the society at the London office, was founded upon a proposal made by Robert Henderson Robertson to the office in London, he being at that time resident in London."

Paragraph 15, "The several deeds, memoranda, and agreements set forth in the bill filed in this cause, and which were executed by Robert Henderson Robertson *in my favour, * 197 were severally prepared and executed in London, and are in the English form, and all the dealings and transactions between Robert Henderson Robertson and myself, or my firm of Venning, Naylor, and Robins, were had in London." And other paragraphs in which he said, "The transactions and dealings between me and Robert Henderson Robertson, and between him and my firm, extend over about sixteen years and were very numerous; the items of disbursements in the cash account alone amounting to about six hundred in number, and very many memoranda and vouchers passed between me and my firm and Robert Henderson Robertson, which will require to be construed according to English law; and amongst other items of account are very voluminous bills of costs of my firm against Robert Henderson Robertson, which can only be taxed so far as the same are now liable to taxation by the taxing officers of the Courts of Law or Equity in England."

After making of this order, and on the 3d of May, 1858, the defendant M'Cubbin put in his answer in this suit, in which he referred to an affidavit filed in this cause by his solicitor, stating the proceedings in Scotland, and also stating that the Scottish Widows' Fund and Life Assurance Society had its head office in the city of Edinburgh, and was therefore subject to the jurisdiction of the Court of Session; that, according to the law of Scotland, the society and the trustees of the society were judicially prohibited by the arrestments from parting with the possession of any sums or debts due by them to Walter Charles Venning, to the extent of 10,000*l.*, and were bound to retain them unless Walter Charles Venning found security in the books of the Court of Session, that

the debts or sums to the extent of 10,000*l.* should be made
 * 198 forthcoming to David * M'Cubbin as trustee as aforesaid, and until the Court of Session therein, and in consideration of the security being found, loose and discharge the arrestments against the plaintiff; that the arrestments, by the law of Scotland, gave the defendant M'Cubbin, as trustee, a preference before other creditors of the plaintiff, if any there were, to the extent of 10,000*l.* over the debts and assets belonging or due to him in the hands of the Scottish Widows' Fund and Life Assurance Society; and that they further entitled him (M'Cubbin), as soon as he obtained judgment in the Court of Session suit against the plaintiff, to apply to the Court of Session in the form of a summons of forthcoming, and the Court would under such summons ordain the assurance society to pay to the defendant M'Cubbin the sums or debts in their hands due or belonging to the plaintiff, to the extent of the sum found due in the suit. The answer further stated, that the Court of Session in the aforesaid circumstances was a competent and proper Court to try the question of debt between the plaintiff and the defendant M'Cubbin, and was also a competent Court to fence and arrest the moneys in the hands of the Scottish Widows' Fund and Life Assurance Society, and had begun the exercise of their jurisdiction to try the question of debts, and had attached the sum or sums due under the policies to the aforesaid effect, before any bill in Chancery was filed by the said plaintiff to compel the Scottish Widows' Fund and Life Assurance Society to pay over the contents of the policies to the plaintiff.

The plaintiff then gave notice of motion for a decree, and on the 13th of December, 1858, a decree was made in the presence of all

parties, directing an account of what was due to the plaintiff on his securities, and declaring that he was entitled to a lien on the policy moneys for the amount to be found due.

* In pursuance of this decree the parties went before the * 199 chief clerk of the Vice-Chancellor to take the accounts. It was stated at the bar that the defendant M'Cubbin, in the first instance, appeared before the chief clerk, but that he afterwards withdrew. From the affidavits which were before the chief clerk it appeared that the plaintiff's vouchers and documents, by which his account was to be substantiated, had been lodged in the Court of Session in Scotland, according to the practice of that Court; that they had been delivered out to the defendant M'Cubbin for his examination, and were not returned by him until he was compelled to return them by process issued, or threatened to be issued, against him; and that, after they were so returned, he obtained an interdict to prevent their being taken out of Scotland, and resisted successfully an application made by the plaintiff to have them delivered out for the purpose of their being used under the decree. The defendant, however, failed in his attempt to defeat the decree as the plaintiff was able to substantiate his account by secondary evidence. The chief clerk accordingly made a certificate, by which he found that the amount due to the plaintiff very far exceeded the policy moneys, and upon this certificate the Vice-Chancellor, by an order on further consideration bearing date the 8th of July, 1859, ordered the moneys in Court to be paid to the plaintiff in part payment of what was found due to him by the certificate.

From this order and from the decree and the order for the payment of the money into Court the defendants, the trustees of the assurance society, and the defendant M'Cubbin presented separate appeals.

Sir Hugh Cairns and *Mr. Baggallay* appeared for the defendant M'Cubbin.

* *Mr. Anderson* and *Mr. Rawlison*, for the trustees of the * 200 assurance company.

Mr. Rolt and *Mr. Roxburgh*, for the plaintiff. — The nature of the arguments appears sufficiently from the judgment.

The following authorities were referred to: *Elliott v. Lord Minto*, (a) *The Carron Company v. Maclaren*, (b) *The London and North-Western Railway Company v. Lindsay*, (c) *Ostell v. Le-page*, (d) *Pennel v. Roy*, (e) *Bushby v. Munday*, (g) *Bunbury v. Bunbury*. (h)

Judgment reserved.

December 19.

THE LORD CHANCELLOR. — If the appellant M'Cubbin, trustee of the sequestered estate of Robertson, had appealed against the Vice-Chancellor's decree in this suit dated the 18th of December, 1858, as soon as that decree was pronounced, I am strongly inclined to think that he would have been entitled to succeed.

All my reasoning proceeds upon the supposition (which I see no reason to question) that the Court of Chancery in England and the Court of Session in Scotland had a common and equal jurisdiction over the matter in dispute, viz., Venning's right to the proceeds of the policy which Robertson, the bankrupt, had effected * 201 * on his own life. *Primâ facie* this policy formed part of the estate of Robertson, to be divided among his creditors: Venning alleged that the policy, which was in his possession, had been assigned to him by Robertson as a security for a debt, and that there was a larger sum due to him from Robertson than the sum recoverable on the policy. M'Cubbin, admitting the assignment, insisted that on taking the accounts between Robertson's estate and Venning there would be found a considerable balance due to Robertson's estate.

Accordingly, on the 4th of September, 1857, M'Cubbin raised an action of "count and reckoning" in the Court of Session against Venning, in which that Court had jurisdiction to inquire into all the dealings between Venning and Robertson, including the assignment of the policy, and to adjudge to Mr. M'Cubbin the proceeds of the policy and any balance which might be found due to the estate of Robertson. On the same day M'Cubbin regularly laid an arrestment *jurisdictionis fundandæ causâ* on the 5000*l.* insured by the

(a) 6 Madd. 16.

(b) 5 H. L. Cas. 416.

(c) 2 Macq. 184.

(d) 5 De G. & Sm. 95.

(e) 3 De G., M. & G. 126.

(g) 5 Madd. 297.

(h) 1 Beav. 318.

policy in the hands of the assurance company, whose principal establishment was in Edinburgh, and on the 7th of September, 1857, he laid a further arrestment on the same fund, which in the usual course of law ought to have operated as a security, to the amount of the sum arrested, for payment of the sum to be recovered in the action of "count and reckoning." To this action so regularly commenced Venning appeared as defendant in the Court of Session; and M'Cubbin, the pursuer, by his condescendence, stated articulately and fully his cause of action and the various facts on which his claim was founded. Venning answered this condescendence. There was *contestatio litis*; the Court of Session was seised of the suit, and if it had been regularly prosecuted to judgment, we must * suppose that complete justice would have been done * 202 between the parties.

But on the 2d of February, 1858, Venning filed his bill in this suit in the Court of Chancery against M'Cubbin and the assurance society, praying payment of the sum due on the policy. M'Cubbin, being duly served with process, appeared to this suit as he was bound to do. By an order made in the cause, dated the 21st of April, 1858, it was ordered that the assurance company should pay into Court 5375*l.* 6*s.* 10*d.*, the money due upon the policy, "subject to the further order of the Court, but that such payment should be without prejudice in any manner to the Scotch letters of arrestment and the execution thereof, and it was ordered that the money so paid in should not be paid out or disposed of without notice to M'Cubbin."

Hitherto the Court of Chancery may be considered as intending only to secure the fund, and to be ancillary to the Court of Session in the suit there depending between the same parties.

But after this order M'Cubbin put in his answer to the bill in Chancery, stating all the facts of the case and the proceedings in the Court of Session, with a view that the proceedings in the Court of Chancery should be stayed, and that justice might be done between the parties in the Court of Session, where all the accounts and documents to prove the case of M'Cubbin were deposited and impounded. Venning, however, gave notice of a motion for a decree in the Court of Chancery, and the cause coming on for hearing on the 13th of December, 1858, a decree was adversely pronounced, directing an account to be taken of what was due to Venning from Robertson, and declaring that Venning was entitled

* 203 to a lien on the * policy for the amount to be found due, with the intent of making the order, which was afterwards made on the 9th of July, 1859, by which, when the amount due from Robertson to Venning had been found by the chief clerk to exceed the sum due on the policy, the money which had been paid into Court, and which was the subject of the two arrestments, was ordered to be paid over to Venning.

The decree of the 13th of December, 1858, appears to me to be erroneous; and, had there been an immediate appeal against it, I think that it ought to have been reversed. As I said before, I do not question the jurisdiction of the Court of Chancery over the subject-matter of the suit; I consider it wholly immaterial that M'Cubbin was domiciled in Scotland, and whether the assurance company is to be considered domiciled in Scotland or in England, or in both countries, signifies nothing. But the Court had jurisdiction to stay the proceedings in Chancery, on reasonable terms, till the Scotch suit should be determined; and in my opinion ought to have done so. This is not a case of conflict of jurisdiction, or depending upon the comity shown to each other by the tribunals of different States according to the law of nations. This case was, I think, very properly likened during the argument to similar suits having been brought in England in the Court of Exchequer, while that Court still possessed equitable jurisdiction, and in the Court of Chancery. A suit having been commenced in the Court of Exchequer, if, after bill and answer, a suit had been commenced in the Court of Chancery exactly for the same cause, I conceive that the indecorous spectacle would not have been exhibited of the two Courts running a race against each other, and that the Court of Chancery would have forbore to make a decree in the very matter on which the Court of Exchequer was deliberating.

* 204 In the present * case there was no clashing between the law of England and the law of Scotland, and I see no particular convenience in adjusting the balance between Venning and Robertson in England rather than in Scotland. On the contrary, an interdict had been regularly granted against removing from Edinburgh the accounts and documents by which the balance was to be ascertained. The slow pace at which the Scotch Court was said to be advancing, cannot gravely be assigned as a reason for anticipating its decision. The suit in the Court of Session was not commenced till September, 1857, and little more than a year had

elapsed before the decree finally deciding the matter in dispute was pronounced by the Court of Chancery. I do not find any laches on the part of M'Cubbin in the interval, and it would hardly have been said in the Court of Chancery of former times, that a Court is to be superseded because it may be somewhat tardy in giving final judgment.

At the bar it was assumed that the certificate of the chief clerk was proof that M'Cubbin had no merits, and that he was vexatiously attempting to prevent Venning from realizing a just claim. But the propriety of the decree of the 13th of December, 1858, cannot be supported by the result of the inquiry made under it before the chief clerk in London, if that inquiry ought never to have been directed.

I must likewise observe that this decree is not quite consistent with the order of the 21st September, 1858, which ordered the money to be brought into Court, "without prejudice in any manner to the Scotch letters of arrestment and the execution thereof." The letters of arrestment seem to be rather prejudiced when the money arrested is paid to Venning as his property under a decree of this Court. What is now to become of the * Scotch * 205 action of "count and reckoning"? The jurisdiction of the Court of Session continues; and if there should be a decree of that Court, ordering Venning to pay the 5375*l.* 6*s.* 10*d.* to M'Cubbin to be divided among the creditors of Robertson, how is this decree to be enforced?

To avoid such an unseemly conflict, I think that on the 13th of December, 1858, the Vice-Chancellor, Sir WILLIAM PAGE WOOD, should have pronounced an order similar to that pronounced by Vice-Chancellor Sir JOHN LEACH, in *Elliot v. Lord Minto*, (a) "that the suit should stand adjourned till the determination of the suit for the same cause depending in Scotland."

Had the English suit been first commenced, I conceive that the Court of Session, although having jurisdiction over the subject-matter, would not have permitted a second suit to proceed there; and it would appear from *Bushby v. Monday*, (b) and the authorities collected in the case of *The Carron Company v. Maclaren*, (c) that although the Court of Chancery cannot act directly to stop a suit improperly prosecuted in another country to determine ques-

(a) 6 Madd. 16.

(b) 5 Madd. 297.

(c) 5 H. L. Cas. 416.

tions which ought to be adjudicated upon here, it will stop the prosecution of such a suit by granting an injunction, to operate indirectly upon the person who so attempts to prosecute it.¹

But, although for these reasons I disapprove of the decree directing the inquiry before the chief clerk, and declaring Venning to have a lien on the policy to the extent of his debt, I am of opinion that this appeal ought to be dismissed. M'Cubbin, instead

* 206 of immediately appealing * against it, went before the chief clerk in obedience to it, and although there be some conflict as to what there passed, he certainly did not appeal till after the order of the 8th of July, 1859, directing the money to be paid over to Venning, and after that order had been acted upon. Whether or not he gave evidence before the chief clerk, he must be considered as having acquiesced in the inquiry; and the inquiry having taken place, if not with his sanction, at any rate without the resistance which might have been opposed to it, and the result of the inquiry turning out so favourably for him, I think he cannot now be permitted to contend that the inquiry was improper.

Therefore, of the decree of the 13th of December, 1858, I say "*fieri non debuit factum valet.*"

I felt myself bound to express my sentiments respecting it, although I concur in the opinion that the appeal should be dismissed; for, with the most sincere respect for those who may take a different view of the subject, I apprehend that very serious inconvenience may arise from the notion that, if a suit is commenced and is in the course of prosecution before a competent tribunal to determine a disputed right, another suit may be commenced and prosecuted before another tribunal of co-ordinate jurisdiction to determinate the same disputed right, although the disputed right might be determined before either tribunal with equal convenience.²

Upon the whole I am of opinion that both appeals should be dismissed with costs.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1626, 1627, and notes and cases; Dehon v. Foster, 4 Allen, 550; Marco v. Low, 55 Maine, 549; Hope v. Carnegie, L. R. 1 Ch. Ap. 520; Baillie v. Baillie, L. R. 5 Eq. 175; Graham v. Maxwell, 1 Mac. & G. 71, note (2); Pennell v. Roy, 3 De G., M. & G. 125, note (2), 126, note (1); Kerr Inj. 154-160.

² See Uhfelder v. Levy, 7 Cal. 607.

THE LORD JUSTICE KNIGHT BRUCE. — My impression is in favour of the course taken by Vice-Chancellor * Wood * 207 throughout, and I think that, at whatever time an appeal might have been presented in this case, it would have been right to dismiss it. As matters actually stand, I think both the appeals frivolous as well as groundless, and fit only to be dismissed with costs.

The Lord Justice TURNER, after recapitulating the facts before stated, proceeded : —

It will be convenient to consider these orders separately ; and, first, with reference to the order for payment of the money into Court. With all respect to the arguments urged at the bar upon these appeals this order seems to me to have been quite of course. The plaintiff having appeared in the suit in Scotland, and the defendant M'Cubbin having appeared in this suit, both the Court in Scotland and this Court had complete jurisdiction, not only over the moneys assured by the policy, but over the conflicting claims of the parties in respect of those moneys. The institution by the defendant M'Cubbin of his suit in Scotland could not of itself have any greater effect than if he had instituted his suit in England, and if he had done so he could not have prevented the plaintiff from afterwards instituting this suit. One of several claimants to a fund cannot monopolize the right of suit in respect of it. It would obviously be most unjust and inconvenient if he could ; for, if he should think fit to dismiss his suit, or should fail at the hearing, there could be no decree in favour of the other claimants, and the time which had been occupied in his suit would be lost to them. Unless, therefore, the arrestments vary the case, the order as it seems to me was plainly right, and the arrestments cannot vary the case, for the rights under them are saved by the order. To hold that the plaintiff was not entitled to call for the payment of the money into Court, would be to hold that he was bound to leave * the money in the hands of the trustees * 208 of the society, which certainly he was not bound to do, if the rights of the defendants were reserved. Whether he would have been bound to do so if those rights had not been reserved ; and, therefore, whether the reservation of them contained in the order was correct or not, it is not necessary for us to say. The

reservation is one of which the defendant M'Cubbin cannot complain, and which in the result does not affect the other appellants.

Then as to the decree, it is sufficient I think to say that if the plaintiff was, as for the reasons already given I think he was, entitled to institute this suit, he could not be less entitled to prosecute it; and that no decree could have been made more favourable to the defendant M'Cubbin, as the order made on payment of the money into Court was continued.

Lastly, as to the order on further consideration. This Court, having possession of the fund, having before it the parties claiming to be entitled to the fund, and having ascertained the rights of those parties in their presence, for the defendant M'Cubbin, although he may have thought proper not to attend, cannot be allowed to say that he was not present, was surely entitled if not bound to dispose of the fund according to those rights. It is said that the suit in Scotland was first instituted; but if that suit had been in England the pendency of it could not have prevented the final order in this suit from being pronounced, and, apart from any special remedies incident to the proceedings in Scotland, it cannot surely be said that this Court ought to give any greater effect to proceedings in that country than would be due to the same proceedings had they been taken in this country. It is said, however, that this Court ought to have held its hand upon the

* 209 ground of the arrestments which had been laid * in Scotland, but one of those arrestments had been already satisfied by the plaintiff having appeared in the Scotch suit, and the other arrestment was for security to answer the result of the Scotch suit. In this case, however, the debt arrested was validly assigned according to the law of this country upon a contract entered into here between parties domiciled here, and is recoverable according to the law of this country; and I do not apprehend that, under such circumstances, this Court can be in any way bound to supersede its own law in favour of the law of Scotland. There may possibly be cases in which, even under such circumstances, this Court would impose upon the party suing in this country the obligation of giving the security required by the law of Scotland; but, if this can be done at all, I think it can only be done where the justice of the case plainly requires it, and, looking to the state of the account between these parties, I see no foundation for requiring it to be done in this case.

With reference to the general law upon this subject there have been some cases in which this Court has refused to interfere with proceedings in foreign Courts upon the ground of convenience, and upon the same ground this Court might, as I apprehend, suspend its decree until a decision had been come to in a foreign Court; but if we look at this case with reference to the question of convenience, I think that the affidavit to which I have referred abundantly shows that the convenience is in favour of the proceedings in this Court, and not of the proceedings in the Court of Scotland. The case of the Carron Company, which was referred to on the part of the appellants, does not seem to me to have any bearing upon the question before us. It decides no more than that this Court ought not to interfere to restrain a foreign creditor from proceeding to recover his debt according to the law of his own country, and does not touch the *question whether *210 the foreign creditor could prevent a creditor here from recovering according to our law, which is what the appellant M'Cubbin is endeavouring to do. It was suggested, on the part of this appellant, that he was misled by the order upon the motion having been made without prejudice to the arrestments, and having been continued by the decree; but this provision, which was very properly introduced whilst it was uncertain whether the Court in Scotland or this Court would first arrive at a final decision between the parties, can hardly have been supposed by the defendant M'Cubbin, or his advisers, to be otherwise than temporary merely, more especially as the Court by the decree declared the plaintiff's lien and directed the account to ascertain what was due upon it.

I have entered thus fully into the case not from having myself felt any difficulty upon the points, but because I should be sorry that the Courts in Scotland should suppose that this Court would not pay all proper regard to their orders and process. This Court will not fail to give full attention to proceedings in Scotland, as the Scotch Courts will no doubt do to the orders and proceedings of this Court.

I am of opinion that these appeals are altogether unfounded, and ought to be dismissed with costs.

1859. December 5, 6, 17. Before the Lord Chancellor Lord CAMPBELL.

A contingent liability under a covenant executed but not broken by a testator is a debt within the meaning of the provision for payment of debts, excepted from the operation of the Thellusson Act.¹

A testator bequeathed shares in a newspaper to his wife, with a proviso, that if they should be sold, the purchase-money should be placed in the funds, and that she should have the interest for her life; but should she not sell the shares, then whatsoever sum might annually accrue from them above 200*l.* was to be reserved as a kind of sinking fund for the protection of the shares: *Held*, that a large fund which had arisen from the income beyond 200*l.* a year, and which was not required for the protection of the shares, formed capital, and that the widow was entitled only to a life-interest therein.

THIS was an appeal from the decision of the Master of the Rolls, as to the validity of a trust for accumulation contained in the will of a testator named James Faden (Quartermaster of the Royal Marines), dated the 12th of August, 1828, the material portions of which were the following:—

“I do hereby leave and bequeath my four shares in the Globe and Traveller, to my dearly beloved wife Christiana Adelaide Faden, and also my two houses in Francis Street, Woolrich, together with the furniture in the one I dwell in, and together with the books, wine, and plate which I may possess. The execution of the lease of the two houses has been deferred from my ill-health, but there will be no obstacle to her execution of it, and I recommend it to be done without loss of time. This being done, my advice is to part with the house I reside in to government, as a residence for the commandant, or otherwise to let it to an artillery officer of rank; with that view, she should take with her into the adjoining house that part of the furniture which may be suitable, and sell the remainder. In the event of the house being let, the rent is to go to her, and, in the event of its being sold, the interest of the money arising is to go to her; the purchase-money to be placed in the funds. In the same manner, should the four

¹ See *Lewin Trusts* (5th Eng. ed.), 75; 1 *Jarman Wills* (3d Eng. ed.), 287.

shares be sold, the purchase-money is to be placed in the funds, and she is also * to have the interest thereof during * 212 her natural life; but, should she not sell the shares, whatever sum may annually accrue from them, above 200%, is to be reserved as a kind of sinking fund for the protection of those four shares in the Globe newspaper. At her decease, the whole of the property arising from their shares or from the sale, as also that arising from both houses or from their sale, is to be divided unequally between Miss Marianne Varlo and Miss Louisa Varlo, Miss Marianne Varlo receiving one-third, and Miss Louisa Varlo two-thirds; and upon their decease it is to be divided equally among the other surviving children of Captain Varlo."

And the testator appointed Captain George Varlo and Mr. Anthony Gordon trustees for carrying his will into effect.

The testator died without issue on the 9th September, 1828, and his will was proved by both the executors.

The testator, at his death, was owner of the four shares in the Globe and Traveller newspaper referred to in his will. The Globe and Traveller newspaper was, at that time, the property of several proprietors, and was divided into sixty-two shares. The rights and interests of the several proprietors were regulated by partnership articles dated the 25th March, 1826, of which the material provisions were the following:—

The 12th article provided that the partners would, every of them, according to their respective shares and interests for the time being in the partnership property, contribute, in due time their due shares or proportions of and to all payments, fines and costs, losses, damages, charges, and expenses which might be incurred by the partnership or by any of the copartners in the conduct or management of the said newspaper, or any article, matter, or thing therein contained, or by or in consequence of any bond or bonds given and to be given, for * the due * 213 and regular payments of the stamps required for the lawful sale of the newspaper, and for the duty on advertisements, or otherwise howsoever.

The 15th provided, that if, upon the settlement of the accounts at the first weekly meeting in every month, there should remain a balance of profit above 500%. (which was to be retained as a capital), it should be divided among the partners according to their

shares and interests therein ; and also, that if at any first weekly meeting in every month, or other meeting, the balance on such monthly or other account, or settlement, should discover a loss to the concern arising from fine or otherwise ; then, as often as it should so happen, such loss should be immediately answered and made good by the partners according to their several and respective shares, rights, and interests therein ; and that, if, at any weekly, monthly, or special meeting a call should be made on the partners for an advance to carry on the business, and if any of the partners should neglect to answer or make good his share and proportion of such loss, for the space of one calendar month next after the settlement of any account by which the amount of such loss should be ascertained, the other partners were to be at liberty to sell the shares of the defaulters.

The 16th article provided, that, upon the death of any of the copartners, there should be no other right or benefit of survivorship than such right of pre-emption as next thereafter mentioned, and that no other advantage on that event should be taken by the surviving partners or by any of them ; but that the interest of the deceased partner should vest in and devolve upon his personal representatives or any other person or persons to whom he should bequeath such interest ; provided that his executors or

* 214 administrators or legatees should, within * one calendar month next after his decease, render themselves subject and liable to the performance of the agreements, covenants, and liabilities to which the then surviving partners might be then subject in respect of the said joint concern ; and should, if thereto required, enter into and execute a deed or deeds at his or their expense, containing covenants with the other partner or partners for the time being, to observe, perform, fulfil, and keep such clauses, agreements, covenants, matters, and things, rules, orders, and resolutions as should be then subsisting and in force with respect to the said partnership concerns.

The 17th article provided, that, in case the representatives of a deceased partner should refuse or neglect to comply with the conditions last mentioned, or if any of the said partners for the time being should be desirous of selling and disposing of their shares, the other partners, or any one or more of them, should have the preference and right of pre-emption of the shares of the deceased or selling and retiring partner, at the price at which such share or

shares should have been last valued at the then last first weekly meeting, or at the last valuation thereof.

On the death of the testator, the executors were requested by the widow not to sell the shares, and they accordingly retained them in manner provided by the partnership articles.

The annual sum of 200*l.* was duly paid to the testator's widow, out of the dividends arising from the shares, so long as they were sufficient for that purpose, and a considerable accumulation had been made from the surplus income which from time to time had been converted and accumulated by the executors for the purpose of forming the sinking fund directed by the will.

At the expiration of twenty-one years from the death * of * 215 the testator (*viz.*, on the 9th September, 1849), the accumulations amounted to 5059*l.* 12*s.* 9*d.* 3*l.* per cent consolidated bank annuities, and since that time the fund had been increased by a further sum of 1479*l.* 3*s.* 10*d.* like annuities; so that, in January, 1858, the whole fund arising from the accumulations amounted to 6588*l.* 16*s.* 7*d.* like annuities.

The shares, since the death of the testator, had become depreciated in value, and the dividends, in June, 1847, became insufficient to pay the annual sum of 200*l.* a year to the widow, and continued to be insufficient till June, 1854. During the intermediate time the 200*l.* a year was made up out of the income of the accumulated fund.

In 1858, questions arose between the plaintiff and defendants as to the construction of the will, the plaintiff insisting that the direction in the will for the accumulation of the surplus was within the provisions of 39 & 40 Geo. 3, c. 98 (the *Thellusson Act*), and that the accumulation, therefore, ceased to be lawful at the end of twenty-one years from the testator's death. She claimed to be entitled to all accumulations as well before as since the expiration of such twenty-one years, and to all the future dividends upon the four shares.

The defendants, the legatees in remainder, contended that the direction for accumulation was within the exception contained in the second section of the statute (*a*) as * to * 216

(*a*) Sect. 2 of the *Thellusson Act*, 39 & 40 Geo. 3, c. 98, enacts, "that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons: or to any provision for raising portions for any child or children of any grantor, settlor, or devisor,

debts, and that the accumulation of the surplus dividends of the four shares, after payment of the 200*l.* to the testator's widow, ought to be accumulated during the widow's life, and that on her death the shares and the accumulated fund, or the latter and the income arising from the four shares, or the income arising from the shares, and from the accumulated fund, would belong to them. The defendant Rose Faden, the sole survivor of the testator's next of kin at his death, contended that the provision for accumulation was void beyond twenty-one years; that the accumulations since that time, and the future surplus dividends during the life of the widow, upon the shares after payment of the 200*l.* a year were undisposed of by the testator's will. The defendant, the widow, claimed a right to share in the undisposed-of property, if this construction should be deemed correct.

The bill was filed by Captain George Varlo, the executor, the defendants being C. A. Faden, the testator's widow, Marianne Strangways, widow (formerly Marianne Varlo), Charlotte Louisa Bayles, widow (formerly Charlotte Louisa Varlo, in the will called Louisa Varlo), Henry Varlo, the only surviving child of Captain George Varlo and Rose Faden. It prayed that the rights and interests of the parties in the four shares, and in the accumulations and the dividends and proceeds thereof under the will of the testator might be declared, and that the trusts of the will, so far as they related to the shares, accumulations, dividends, and proceeds might be carried into execution under the direction of the Court.

The cause came on to be heard on motion for decree, before the Master of the Rolls; and by the decree then made, dated 14th July, 1859, it was declared (among other things) that the trusts * 217 for accumulation directed by * the will of James Faden, of the income of the dividends of the four shares in the *Globe* and *Traveller* newspaper, was valid until the time of the sale thereof directed by the decree; that the defendant, the testator's widow was entitled to call for a sale of such four shares, and that the accumulations which had arisen from the profits of the said four shares passed under the trusts of the testator's will to the defendants Marianne Strangways, Charlotte Louisa Bayles, and Henry

or any child or children of any person taking any interest under such conveyance, settlement, or devise; or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given, as if this Act had not passed."

Varlo, subject to the life-interest therein of the testator's widow, and to the liabilities in respect of the four shares, and also to the payment of the taxed costs, charges, and expenses of the suit. And it was thereby further declared that the appellant, the testator's widow, was entitled during her life to the dividends and income thenceforth to arise from the accumulated fund, and from the proceeds of the four shares, subject to the costs and liabilities before mentioned, and it was ordered that the costs of all parties taxed, as between solicitor and client, should be paid out of the whole fund which had arisen from the accumulation of the dividends of the four shares.

The case is reported in the 27th Volume of Mr. Beavan's Reports. (a)

From this decree, except so far as it declared the testator's widow entitled to call for a sale of the shares, she appealed.

Mr. Loyd and Mr. E. F. Smith, for the widow, in support of the appeal. — The accumulation directed by the testator of the surplus * dividends of the shares is not within the exception * 218 of the second section of the Thellusson Act, and is therefore void so far as it extends beyond twenty-one years from the testator's death. In the first place, the object for which it is directed, viz., to create a sinking fund for the protection of the shares, cannot be considered as the payment of a debt at all. It is not properly a debt either of the testator or of any other person. Next, if it is to be considered a debt, it is not a debt existing at the date of the will or at the death of the testator, but a future or contingent debt, which possibly might never come into existence within a life or lives in being and twenty-one years afterwards. It is admitted that ever since the date of the will there has always been a balance of profit upon the shares over and above the 500*l.* which was to be retained pursuant to the 15th article of the partnership deed, which has been divided amongst the shareholders. No debt or liability, therefore, has as yet ever arisen in respect of the shares under the deed, either against the testator's estate or "any person or persons" whatsoever, and there is no reason why this state of things should not continue indefinitely. To hold a liability of so uncertain and indefinite a character to be within the exception of the statute would be at once to let in the evil intended

to be avoided by the statute, and would enable testators, under the pretence of providing for the payment of future and uncertain debts or liabilities, to evade the provisions of the Act. It is submitted that the debts contemplated in the second section of the statute are debts existing at the date of the will or at the death of the testator, and not future or contingent debts. *Barrington v. Liddell*. (a) It

was not the intention of the legislature to except out of the * 219 provisions of the * Act all directions in the wills of testators for payment of debts other than those which should be in existence at the testator's death. Assuming, then, the accumulation of surplus dividends, which accrued on the four shares subsequently to the expiration of twenty-one years from the death of the testator, to be void, it is submitted that upon the true construction of the will, these belong to the testator's widow absolutely. The Courts from the earliest times have regarded with jealousy executory gifts of personal estate, and have held that, where the terms of the gift are in the first instance sufficient to pass an absolute interest to the donee, that interest cannot be defeated except by a gift over in the clearest terms, and of a character which the law allows. *Skey v. Barnes*, (b) *Kampf v. Jones*, (c) *Carver v. Bowles*, (d) and *Ring v. Hardwick*. (e) Here the terms of the gift in the first instance, of the shares, to the widow convey just as absolute an interest in them as that which is bequeathed in the minor articles enumerated in the gift, and which are not afterwards given over; and no part of the absolute gift thus expressed is given over till the widow's decease, when the shares themselves or their proceeds are bequeathed to the defendants. The whole of the accumulations of the surplus dividends of the shares, whether within or beyond the lawful period, which have not been nor are required for the protection of the shares, belong to the testator's widow. The gift over here is contingent on the legatees in remainder surviving the widow, and is afterwards contingent on other children of Captain Varlo surviving those legatees. It is submitted that the gift of the shares being in the first instance an absolute gift to the widow, will remain so, should the subsequent in-

* 220 terests * not arise. *Lady Langdale v. Briggs*, (g) *Gos-*

(a) 2 De G., M. & G. 480.

(d) 2 R. & Myl. 301.

(b) 3 Meriv. 335.

(e) 2 Beav. 352.

(c) 2 Keen, 756.

(g) 26 Law J. N. S., Ch. 27.

ling v. Gosling. (a) Finally, we contend that the costs of suit should have been ordered to be paid out of the amount of accumulations within the lawful period. *Eyre v. Marsden.* (b)

Mr. Follett and Mr. Dart, for a child of Captain Varlo, in support of the decree at the Rolls. — The statute, being in restriction of common-law rights, must be construed strictly as to the prohibitory, and liberally as to the excepting, clause. *Tench v. Cheese.* (c) Had the provision been for payment of the debts of a stranger, the accumulation must have been held good as within the exception in the second clause of the Act. *Barrington v. Liddell.* (d) The provision here for accumulation is to meet liabilities which might arise in respect of the shares under the deed of 25th of March, 1826, and to prevent them from being sold or forfeited under the provisions of that deed. The testator, by signing this deed, has made himself liable under a covenant to contribute ratably to the expenses of, and to make good the losses incurred in, the concern. The obligation arising under that covenant was a liability existing at the date of the testator's will, though it might not become an actual debt till after the death of the testator. It was, however, a present liability of the testator, and therefore within the provision of the second section of the Act. Viewing it, however, as a contingent or future liability, it would still be within the exception. In *Wilson v. Knubley*, (e) it was decided * that such a liability was not a debt * 221 within the Statute of Frauds, 3 & 4 Will. & M. c. 14, but the reason was that the remedy given by that statute was an action of debt, and that as an action of debt did not lie in that case, the statute was inapplicable. But damage, recovered for breach of such a covenant after the covenantor's death, has been held to be a debt payable out of the real estate of the covenantor, under a charge of debts thereon created by his will. *Morse v. Tucker.* (g) And in *Fletcher v. Stevenson*, (h) both the principal and interest of a testator's residuary estate were retained in an administration suit to answer a contingent liability under a covenant entered into by the testator in his lifetime. So also the Act

(a) John. 265.

(b) 4 Myl. & Cr. 231.

(c) 19 Beav. 3; S. C., 6 De G., M. & G. 453.

(d) 2 De G., M. & G. 498.

(g) 5 Hare, 79.

(e) 7 East, 128.

(h) 3 Hare, 360.

8 & 4 Will. 4, c. 104, charges the real estate of which a person dies seised not only with debts of every description actually due from him at his death, but also with all liabilities which may result out of obligations entered into by him during his life. *Re St. George's Steam Packet Company* (Hamer's Devises' Case). (a) The debts and liabilities which might be incurred by the testator, his representatives or legatees, under the deed of 25th of March, 1826, are therefore clearly debts within the provision of the second clause of the Thellusson Act, and an accumulation for the purpose of providing for such debts is clearly protected by the exception in that section. Then as to ultimate destination of the surplus accumulations, it is submitted that, not having been required for the purpose for which the testator directed the accumulation, they, upon sale of the shares, will belong to the testator's widow for her life, and after her decease to those entitled in remainder according to the terms of the will. By those terms the whole of the property arising

* 222 ing from the shares, or from their sale, * is to devolve upon those named as legatees in remainder after the decease of the widow, and the absolute gift to her in the first instance restricted to a life-estate. The suit having been instituted for the purpose of determining what is to become of the whole accumulated fund, the costs of the suit should be borne by the whole of that fund.

They cited also *Burt v. Sturt* (b) and *Eardley v. Owen*. (c)

Mr. Selwyn and *Mr. Bevir*, for Marianne Strangways and Louisa Bayles, took the same line of argument.

Mr. Cole, for Rose Faden.

Mr. Roundell Palmer and *Mr. C. Hall*, for the trustees of the will.

Mr. Lloyd, in reply.

Judgment reserved.

(a) 2 De G., M. & G. 866. (b) 10 Hare, 415. (c) 11 Jur. 1047.

[170]

December 17.

THE LORD CHANCELLOR. — I am of opinion that the decree of the Master of the Rolls in this case ought to be affirmed. The accumulation in question is forbidden by the general words of sect. 1 of Stat. 39 & 40 Geo. 3, c. 98; but sect. 2, by way of proviso, introduces an exception of “any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons.”

There was a good deal of discussion at the bar, whether this statute should or should not be strictly construed. It certainly is not a penal statute, and I do not * know that the * 223 power of a testator to direct his property to accumulate many years after he is in his grave, is any natural or constitutional right which is to be anxiously protected. We have only to strive to discover the intention of the legislature in passing the Act, looking at the supposed mischief which was to be remedied, and the extent of the remedy meant to be applied. The whole statute must be taken together, and construed as if, consisting of one clause, it had begun “unless for payment of debts of any grantor, &c., no person or persons shall,” &c. The object was to prevent beyond certain limits of time accumulation of property which might be dangerous to the public, and to allow the power of accumulation to remain where *bona fide* exercised for certain specified purposes.

It is not pretended that James Faden, the testator, by directing that any sum which might accrue from the four shares in the Globe newspaper above 200*l.* a year “should be reserved as a sort of sinking fund for the protection of the shares,” meant to rival Mr. Thellusson, and to create a fund which might make his descendants too wealthy for a subject. His good faith in making the provision for the security of those who were to take the shares under his will was not disputed. He himself, along with the other shareholders, had executed the articles of partnership by which he covenanted, according to the number of his shares, to contribute to all the debts and charges of the newspaper, and that his executors, administrators, and legatees should, in respect of these shares, render themselves subject and liable to the performance of the covenants and liabilities to which the surviving copartners should be subject and liable as shareholders in the joint concern. This, like other literary speculations, was subject to vicissitudes; and, although in the result there was a considerable sum accumulated * from the overplus beyond the 200*l.* a year, * 224

in some years the profits of the shares did not reach that amount, and it was necessary to supply the deficit from the accumulated fund. Debts might have been incurred by the concern for which the representatives of the testator or his legatees of the four shares might have been liable to a much larger amount, and which might have rendered the shares subject to sale or forfeiture. The accumulation therefore was certainly "a provision for payment of debts."

Objection was made that these are not "the debts of the grantor, settlor, or devisor." But the statute goes on to say, "or of other person or persons," and Lord ST. LEONARDS appears to intimate in *Barrington v. Liddell*, (a) that a provision for payment even of the debts of a stranger would come within the exception; whereas here the debts may be considered indirectly the debts of the testator; for he was a party to the deed from which the debts originated.

The main contention on the part of the appellant, however, was that the debts must be past debts. But debts afterwards to accrue, for which the grantor, settlor, or devisor is liable, are surely the debts of the grantor, settlor, or devisor, and a *bond fide* provision for payment of such debts could not interfere with the policy of the legislature in guarding against accumulations dangerous to the commonwealth. A *dictum* was quoted of Lord ST. LEONARDS, in *Barrington v. Liddell*, (a) where that great Judge, commenting on this statute, is reported to have said, "It is clear that the provision as to debts must relate to past debts." But this is not an intimation that it must relate to past debts exclusively; and he goes on to finish his sentence by adding, "and nobody can * 225 deny that a * man being able by his will under this Act to provide for his debts generally, this will include his future debts."

If it were necessary that the obligation under which the liability for the debts was created should have subsisted in the lifetime of the testator, there would be ground for contending that the partnership deed was such an obligation. In argument it was admitted that if this deed had made the testator's executors directly liable to be sued for these debts, the debts might be considered as his; and the 17th article in the partnership deed seems to amount to a

(a) 2 De G., M. & G. 498.

covenant by each partner that there shall be a remedy in respect of each share for future charges upon the partnership. *Fletcher v. Stephenson* (a) and *Morse v. Tucker* (b) are strong authorities to show that unliquidated damages recovered against executors for a breach of a covenant of the testator which accrued after his death, may be considered for various purposes as a debt of the testator, although not a debt within the Statute of Fraudulent Devises, 3 & 4 Will. & M. c. 14.

The accumulation directed by the testator in the present case, being thus to be regarded as a *bonâ fide* provision for payment of debts within the 2d section of the Thellusson Act, there has been no violation of that Act, and the questions as to the disposition of the fund which arose from the accumulation after twenty-one years from the death of the testator, argued upon the supposition that this accumulation was unlawful, do not arise. The whole fund accumulated must be considered as of the same quality and subject to the same incidents; and I think that the Master of the Rolls properly held that the tenant for life is only entitled to the interest of * it during her life, and that at her death * 226 this fund will be divided, as the testator has directed, along with the *corpus* of the property bequeathed.

I see no reason to vary the order of the Master of the Rolls as to the costs to be paid or received by any of the parties, or the fund from which the costs are to be paid.

This appeal therefore must be dismissed with costs.

(a) 3 Hare, 360.

(b) 5 Hare, 79.

AUDSLEY v. HORN.

1859. December 6, 7, 17. Before the Lord Chancellor Lord CAMPBELL.

The rule in *Wild's Case*, 6 Rep. 17, is not applicable to personal estate.¹

Personalty was bequeathed to the testator's daughter during her life, and at her death to her daughter and to the granddaughter's children, but if they should die without issue, then over. The granddaughter was unmarried at the dates of the will and of the testator's death, and had no child till after the death of the testator's daughter: *Held*, that the granddaughter took a life-interest in the subject-matter of the bequest, with remainder to her children.²

THIS was the appeal of the plaintiffs from the decision of the Master of the Rolls (in a foreclosure suit), that under the will of Thomas Hansard, Amelia Horn, his grandchild, took only an interest for life in the leasehold property which was the subject of the mortgage, and from the decree for foreclosure, so far it excluded the costs of the evidence gone into by the plaintiffs.

The following is a summary of the facts of the case, which are fully stated in the report of the hearing at the Rolls, in the 26th Volume of Mr. Beavan's Reports. (a)

By the will in question, dated the 18th August, 1818,
* 227 * the testator, after giving a life-interest in all his property to his wife, bequeathed as follows:—

“At the death of my wife I leave Hansard Place, Blackfriars Road, to my daughter Mary Rossiter, during her life; and, at her death, to her daughter Amelia Rossiter, and Amelia Rossiter's children; but if they should die without issue, in that case the property to be divided between William Hansard, John Tuttle, and John Leary and Maria Leary.”

The testator held the house and premises described in the will as Hansard Place, Blackfriars, under a lease from the 24th June, 1803, for the term of ninety-five years. He died on the 6th Feb-

(a) Page 195.

¹ See 2 Jarman Wills (8d Eng. ed.), 365, 372 *et seq.*; *Grieve v. Grieve*, L. R. 4 Eq. 180.

² See *Newill v. Newill*, L. R. 12 Eq. 432; *Bibby v. Thompson*, 32 Beav. 647; *De Witte v. De Witte*, 11 Sim. 41; *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *In re Owen's Trusts*, L. R. 12 Eq. 316; *Hoare v. Byng*, 10 Cl. & Fin. 508.

ruary, 1819. On the 1st July, 1834, Amelia Rossiter intermarried with Joseph Horn, by whom she had six children, all of whom were born after the 9th of January, 1835, the day of the death of Mary Rossiter, and were still infants.

In December, 1843, Joseph Horn and Amelia his wife assigned the leasehold premises in question, for the residue of the term of ninety-five years therein, to John Audsley, by way of mortgage to secure 220*l.* and interest.

John Audsley died in February, 1849, and on the 24th March, 1852, Joseph Horn and Amelia, his wife, executed an indenture of further charge of the leasehold premises to the plaintiffs, the personal representatives of John Audsley, to secure a further sum of 198*l.* 5*s.* Joseph Horn died on the 17th April, 1857.

The original bill was filed on the 1st January, 1858, against Amelia Horn as sole defendant, seeking the * com- * 228 mon decree of foreclosure. Amelia Horn, in her answer, after admitting the mortgage and further charge, submitted that she was only entitled to a life-interest in the mortgaged premises under the testator's will, and that her children would become entitled, on her death, to the property; and she stated that they claimed to be entitled to the property, subject to her life-interest therein.

The plaintiffs then amended their bill by making the infant children of Amelia Horn parties, and by praying a declaration that Amelia Horn, or Joseph Horn in her right, was absolutely entitled under the will of her grandfather to the premises comprised in the plaintiffs' securities, and that the infant defendants had no estate, right, title, or interest therein.

The Master of the Rolls, by the decree appealed against, dated the 6th December, 1858, after declaring that Amelia Horn took a life-interest only in the premises in mortgage to the plaintiffs, made the common decree for foreclosure of her life-interest therein, excluding from the decree the costs of the evidence gone into by the plaintiffs, and dismissed the bill with costs, as against the infant defendants.

Mr. Roundell Palmer and *Mr. Cory*, for the plaintiffs, in support of the appeal. — It is submitted that Amelia Horn took an absolute interest in the mortgaged premises under the will of her grandfather. The terms of the bequest thereof, "to her and to

her children, but if they should die without issue, then over," are such as would have given her an estate tail in land: *Wild's*

* 229 *Case*, (a) and they therefore vest in * her an absolute interest in personal estate. *Howston v. Ives*, (b) *Lyon v. Michell*, (c) *Chandless v. Price*. (d) The words, "but if they should die without issue," indicate an intention that the subject-matter of the gift should go in regular course of devolution until the exhaustion of heirs of the body. There is every reason, therefore, why *Wild's Case*, (a) should be held to apply. *Ex parte Wynch's*. (e) It has never been decided that *Wild's Case* (a) is inapplicable to personal estate, and there is no reasonable ground for not so applying it. Upon a question of construction, the decision ought not to be affected by the nature of the subject bequeathed, but the intention expressed by the testator is alone to be regarded. Here the context of the will shows that the absolute gift over is not meant to take effect except on a general failure of issue of Amelia Rossiter, and to carry out that intention, *Wild's Case*, (a) ought to be applied. *Duke v. Lacy*, (g) *Cape v. Cape*. (h) Lord HARDWICKE, in *Buffar v. Bradford*, (i) and Lord ST. LEONARDS, in *Stokes v. Heron*, (k) it is true, expressed an opinion against applying *Wild's Case* (a) to personalty; but Lord PLUNKETT and Lord BROUGHAM, in *Stokes v. Heron*, were on the other hand, in favour of so applying it. If, however, the Court should be of opinion that *Wild's Case*, (a) is not to be applied, then we contend that the bequest created a joint tenancy (expectant on the death of Mary Rossiter) in Amelia Rossiter and her children living at the death of Mary Rossiter; and, there having been no such children then in

* 230 existence, * that the property vested in Amelia Horn absolutely, inasmuch as the interests of joint tenants must vest at the same time. *Buffar v. Bradford*. (i)

A third construction which the bequest admits of, is by reading the word "and" as equivalent to "or" and the limitation as if it were "to Amelia Rossiter, or Amelia Rossiter's children, but if they should die without issue, then over." The gift to the chil-

(a) 6 Rep. 17.

(c) 1 Madd. 467.

(b) 2 Eden. 216.

(d) 3 Ves. 99.

(e) 1 Sm. & G. 427; S. C., 5 De G., M. & G. 188.

(g) 8 Beav. 214.

(i) 2 Atk. 220.

(h) 2 Y. & C. Exch. 548.

(k) 2 Dru. & W. 89; S. C., 12 Cl. & Fin. 161.

dren would then be by way of substitution in favour of the children, if their parent should not be living at the death of the tenant for life, and would not take effect, inasmuch as the parent was, in fact, then living. In the result the same effect would be produced of giving to Amelia Horn the absolute interest. *Burrell v. Baskerfield.* (a)

As to the question of costs, the necessity of making the children parties by amendment, was occasioned by the suggestion of their claim contained in Mrs. Horn's answer. On their being made parties, it was necessary to establish, by evidence, the fact that they were the children of Mrs. Horn, who did not object to the amendment for the purpose of having the question of construction decided. It is submitted, therefore, that the plaintiffs are entitled to the costs of the evidence required for that purpose.

Mr. T. H. Fischer, for Mrs. Horn. — This appeal is, in substance, an appeal for costs. The amendment of the plaintiffs' bill was unnecessary. The mortgagees have no right now to try the question * of construction as against the infant * 231 defendants. All that they can claim is a decree of foreclosure or sale as against the mortgagor, and all that could be included in such decree would be such interest as Mrs. Horn takes in the mortgaged premises under her grandfather's will. Upon foreclosure or sale the mortgagees or purchasers could have remained in possession till the death of Amelia Horn, when the question of title under the will might have been raised upon ejectment by the children. Instead of taking that course the plaintiffs chose, by amendment, to come to this Court for a decision upon the question of construction. In this proceeding the widow has never acquiesced. She had no means of objecting, but the infant defendants might have demurred. This course, however, would have involved the expense of two proceedings instead of one. As against the widow, who has admitted the plaintiffs' title as mortgagees of her interest in the mortgaged premises, the evidence they have gone into was unnecessary, and ought not to be allowed; and as against the infant defendants it must also be disallowed, the plaintiffs' case wholly failing against them.

Mr. Eddis and *Mr. Jessel*, for the infant defendants. — As

(a) 11 Beav. 525.

between the plaintiffs and the infant defendants the object of the bill is simply for a declaratory decree as to the extent of a common-law right, and as against them, therefore, the only decree that can be made is to dismiss the bill with costs. *The Trustees of the Birkenhead Docks v. Laird.* (a) Then as to the question of construction, there is no reason why the rule in *Wild's Case*, (b)

should be applied to personal estate, but rather the contrary. The rule as applied to real estate is derived * either from the old law, which, upon feudal principles, was directed against the successors to real estates taking otherwise than by descent, or it rests upon the ground that the word issue, taken *per se*, includes all the issue, and that the best mode of effectuating the intention in favour of all the issue, is to give an estate tail to the parent, which, in the course of devolution, would embrace them all. But a rule resting upon such foundations, can have no application to personal estate. The feudal principle does not reach the subject-matter, and so far from the application of the rule to personal estate effectuating the intention, it directly and immediately defeats it, for it gives the absolute interest to the parent, and prevents the issue *quod* issue taking any benefit under the disposition. There is no reason why different effect should not be given to the same words as applied to real and to personal estate. Real estate is capable of entail, personal estate not, and there can be no reason why a testator, using the word issue with reference to property which is not capable of being entailed, is to be considered to have had the same meaning as if he had applied the word to property which may be entailed. The great principle in all cases upon the construction of wills is, that the intention of the testator is to be carried out as far as it is consistent with the rules of law. The construction put by Lord THURLOW upon the will in *Knight v. Ellis*, (c) seems much more conformable to the intention of the testator, than the construction contended for by the plaintiffs in the present case. In *Buffar v. Bradford*, (d) Lord HARDWICKE expressed an opinion adverse to the application of the rule in *Wild's Case* (b) to personal estate; and so, also, Lord ST. LEONARDS, in *Stokes v. Heron*. (e) There are, how-

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ever, adverse *dicta*, and the * question may be considered as

(a) 4 De G., M. & G. 732.

(c) 2 Bro. C. C. 570.

(b) 6 Rep. 17.

(d) 2 Atk. 220.

(e) 2 Dr. & War. 89; S. C. 12 Cl. & Fin. 161.

still an open one; but all reasoning resting upon the foundation of the rule is against its being so applied. Next, the words "if they should die without issue," occurring in the bequest under consideration, are to be read as referring to the last antecedent, viz., the children of Amelia Rossiter, who, therefore, on the face of the will, are to take a *quasi* estate tail. The testator is speaking of an unmarried lady. He speaks of her by her maiden name, and must therefore have intended to benefit after-born children. Wherever such an intention has been manifested, it has been the tendency of modern decisions to spell the will so as to make the class to be benefited as large as possible; and, with that view, to give a life-interest to the parent, with remainder to the children. *Crawford v. Trotter*, (a) *French v. French*, (b) *Paine v. Wagner*, (c) *Dawson v. Bourne*, (d) *Jeffery v. De Vitre*, (e) *Froggatt v. Wardell*, (g) *Crockett v. Crockett*. (h)

Another objection, which is fatal to the plaintiffs' case, as against the infant defendants, is, that their interests being future, the Court has no jurisdiction to adjudicate upon them till they arise. *Greenwood v. Sutherland*, (i) *Garlick v. Lawson*. (k)

Mr. Cory, in reply.—There is nothing executory in the gift under consideration. The gift is in direct terms, and there is no indication of an intention that the purpose of the testator is to be carried out by any thing which is not supplied * by the * 234 bare words of the gift. No trustees are interposed, or trusts expressed. The question is one of dry construction of a bequest directly to those who are to take. There is nothing here, as in some of the cases cited on the other side, which the Court can lay hold of as showing that the testator intended the benefit of the gift should devolve in a course of succession rather than by way of a present interest. Granted that it has been the practice of the Court to lay hold of trifling circumstances to support that construction which enables the children and parent to take in succession, still the Court has never attempted to deal with such words as those in the present case, in the way the Master of the

(a) 4 Madd. 361.
(b) 11 Sim. 257.
(c) 12 Sim. 184.
(d) 16 Beav. 29.
(e) 24 Beav. 296.

(g) 3 De G. & Sm. 685.
(h) 2 Phil. 553.
(i) 10 Hare, App. xii.
(k) 10 Hare, App. xiv.

Rolls has dealt with them. In *Crawford v. Trotter*, (a) the use of the word heirs, and in *Morse v. Morse*, (b) the appointment of a trustee, were regarded as circumstances indicative of an intention that the parent was not to take, *simpliciter*, an absolute interest, but that the parent and children were to take in succession. So in *Dawson v. Bourne*, (c) *Jeffery v. De Vitre*, (d) and *Froggatt v. Wardell*, (e) the circumstance that the gift was to the parent for her separate use, was considered a foundation for the same inference.

Judgment reserved.

December 17.

THE LORD CHANCELLOR. — In this suit for the foreclosure of a mortgage, in strictness the Court ought not to make any declaration affecting the rights of those who are neither parties nor privies to the mortgage deed, and the consent of the
 * 235 * counsel for the infant children who have been made defendants, does not entirely remove the objection. But after what has taken place in the Court below, and the arguments addressed to me on the hearing of the appeal, I think I ought to express my opinion upon the question, whether, under the will of Thomas Hansard, Amelia Rossiter, his grandchild, took only an estate for life, or the absolute interest in the leasehold property, which was the subject of the mortgage?

And I agree with the Master of the Rolls that she took only an estate for life.

The contention, that under a bequest of personalty "to Amelia Rossiter and Amelia Rossiter's children, but if they should die without issue then over," Amelia Rossiter takes an absolute interest, having been an unmarried woman at the making of the will and at the testator's death, and having no child born at the expiration of the prior life-estate, is certainly very startling, and seems at variance with the expressed intention of the testator. Although Amelia was unmarried when he made his will and when he died, he might not unnaturally wish to make some provision for her children if she should grow up, marry and have children. It

(a) 4 Madd. 361.

(d) 24 Beav. 296.

(b) 2 Sim. 485.

(e) 3 De G. & Sm. 685.

(c) 16 Beav. 29.

is quite clear that he intended her children to take a benefit; and he contemplated that this might be after the death of their mother. When he says, "if they should die without issue," in that case over he could not mean the word "they" to include both the mother and her children. On the supposition that the mother and her children were to take jointly, if the children had died without issue in the mother's lifetime, the property would immediately have gone over to the four persons who, in that event, were to take in remainder. Surely it would be a much more natural construction of the will to hold that Amelia was * meant to * 236 take a life-interest, with a remainder to her children.

The appellants mainly rely upon *Wild's Case*, (a) (meaning the rule said to have been laid down in *Wild's Case* as the effect of particular words in a will applicable to real estate), and the general rule that words in a will, which would create an estate tail as to realty, will carry the absolute interest as to personalty.¹ Then arises the vexed question, whether *Wild's Case* applies to personalty. This question underwent much discussion in the case of *Stokes v. Heron*, (b) in which, when it came by appeal before the House of Lords, I took a part. As, in disposing of that case, there was no necessity for deciding that question, I forbore from giving any opinion upon it, and, along with Lord COTTENHAM, I wished the question still to be considered as open. Now I am prepared deliberately to say, that, in my opinion, *Wild's Case* (a) does not apply to personal property. The general rule, that words in a will which create an estate tail in realty will give an absolute interest in personalty, is founded upon the desire to give effect to the intention of the testator as far as the rules of law will permit. But the rule ought not to prevail where it would entirely defeat the intention of the testator, and where, without any violation of the rules of law, the intention of the testator may be carried into effect.² The resolution in *Wild's Case*, (a) as to realty, entirely depends upon the desire to benefit the children as the testator intended, because an estate tail in the parent is the only medium by which they can

(a) 6 Rep. 17.

(b) 2 Dr. & War. 89; 12 Cl. & Fin. 161.

¹ See 2 Kent, 353, 354; 2 Jarman Wills (4th Am. ed.), 350, note (1), and cases cited; *Albee v. Carpenter*, 12 Cush. 382; *Hall v. Priest*, 6 Gray, 21, 22.

² See *Grieve v. Grieve*, L. R. 4 Eq. 180; *Byng v. Byng*, 10 H. L. Cas. 178.

take; and were it not for the power of cutting off the entail * 237 (which, in construing wills, is * disregarded), the children must take. But as to personalty, for the purpose of benefiting the children, the application of the rule is wholly unnecessary, and the application of it would entirely defeat the intention of the testator, for it would deprive the children of all right to any benefit under the will. With respect to personalty, there are no technical rules arising from the feudal law to prevent the intention of the testator being literally carried into effect. Here the testator could not mean that Amelia and her children should take jointly; and he no doubt did mean that she should take for her life, and that her children should take at her death.¹ Therefore, the same reason which, with respect to realty, requires that, under such words as are supposed in *Wild's Case*, (a) the parent should take an estate tail, requires that, when they are applied to personalty, the parent should take only an estate for life. Where an estate tail is given by such words applied to realty, an exception arises to the rule that words which give an estate tail in realty, will give an absolute interest when applied to personalty; and this may be considered an exception which proves the rule, as it is supported by the reason on which the rule rests.

Lord PLUNKET and Lord BROUGHAM, in *Stokes v. Heron*, (b) did express an opinion in favour of applying *Wild's Case* (a) to personalty; but Lord HARDWICKE and Lord ST. LEONARDS, however, have expressed a strong inclination of opinion to the contrary; there is no reported decision in which *Wild's Case* (a) has been actually applied to personalty, and the Master of the Rolls, in his judgment, cites several recent decisions which are hardly to be reconciled with the supposition that *Wild's Case* is applicable to personalty. I must, therefore, overrule the first and main * 238 reason on which * the appellants rely in contending for an absolute interest vesting in Amelia Rossiter, that, under

(a) 6 Rep. 17.

(b) 12 Cl. & Fin. 161.

¹ See 2 Jarman Wills (4th Am. ed.) 350, note (1); *Dashiell v. Dashiell*, 2 Harr. & J. 127; *Eichelberger v. Bernetz*, 17 Serg. & R. 293; *Newton v. Griffith*, 1 Harr. & G. 111; *Hannan v. Osborne*, 4 Paige, 386; 2 Kent, 352, 353; *Moffat v. Strong*, 10 John. 12; *Westcott v. Cady*, 5 John. Ch. 334; *Scott v. Price*, 2 Serg. & R. 59; *Mortimer v. Moffat*, 4 Hen. & M. 503; *Geiger v. Brown*, 4 M'Cord, 427; *Brummet v. Barber*, 2 Hill (S. C.), 549.

similar words, if the subject-matter had been realty instead of personalty, she would have taken an estate tail.

It was next contended, but less strenuously, for the appellants, that the limitation to Amelia Rossiter and her children was intended to make the mother and children joint tenants, if Amelia should have any children during the lifetime of Mary Rossiter, the testator's daughter; and for this, *Buffar v. Bradford* (a) was relied upon, where a bequest "to Mary Buffar, and the children born of her body" was held to create a joint tenancy between the mother and the children. But there the whole scope of the will showed that the mother and the children were to take jointly, and it was admitted that they must so take, if *Wild's Case* (b) did not apply to vest the absolute interest exclusively in the mother. Here the scope and the words of the will are wholly inconsistent with the notion of Amelia Rossiter and her children taking jointly, whether the children should be born before or after the death of the testator, or before or after the death of the tenant for life.

Another supposition was made, that the children of Amelia Rossiter might be intended to take by way of substitution; in which case, in the event which happened, an absolute interest vested in the mother upon the death of the tenant for life without any child of Amelia Rossiter being born; and the very obscure case of *Burrell v. Baskerfield*, (c) was relied upon. But, reading the will which we have to construe, I think the plain meaning of the testator was, that Amelia Rossiter *should enjoy the prop- * 239 erty for her life, and that her children in remainder should enjoy it after her death, she in no event being entitled to more than a life-interest in it.

Upon the main question I have only further to notice the objection urged by the appellants' counsel, that here the disposition of the property is not executory, and that no trust is created. *Lady Lincoln v. The Duke of Newcastle*, (d) *Rowland v. Morgan*, (e) and other cases of that class show that an executory trust is sometimes of great importance in enabling a Court of Equity to carry into effect the intention of parties defectively expressed; but, in the present case, I think that the intention of the testator is

(a) 2 Atk. 220.

(d) 12 Ves. 226.

(b) 6 Rep. 17.

(e) 2 Phil. 764.

(c) 11 Beav. 525.

clearly expressed, and that there is no technical difficulty in carrying that intention into effect.

Upon the whole I am of opinion that this appeal should be dismissed with costs.

1859. December 14, 15, 17. Before the Lord Chancellor Lord CAMPBELL.

Upon the eve of a sale by the sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. It appeared that representations were made on behalf of the judgment creditors when they took the guarantee that they had power to stop the sale, and that it would be stopped: *Held*, that the surety was entitled to have the guarantee delivered up to be cancelled.¹

THIS was an appeal from the decree of the Master of the Rolls, directing that a written guarantee given by the plaintiffs to the defendants, to secure the payment by instalments of certain judgment debts due to them from Elizabeth Macdonald, should be delivered up to the plaintiffs.

The following are the short facts of the case, which will be found fully stated in the report of the hearing at the Rolls, in the 27th volume of Mr. Beavan's Reports. (a)

Elizabeth Macdonald assigned her household furniture, pictures, &c., to the trustees of her husband's will, by way of indemnity. Judgment having afterwards been obtained against her upon debts owing to five other creditors, her household furniture, pictures, &c., were seized by the sheriff, under executions issued upon those judgments, and advertised for sale on the 15th of February, 1855. The trustees of her husband's will immediately gave notice of their bill of sale to the sheriff.

The plaintiffs, Cooper and Matthews (Mrs. Macdonald's sons-in-law), with the view of preventing a forced sale, entered into

(a) Page 318.

¹ See Kerr F. & M. (1st Am. ed.) 126, 344, 345; Kerr Inj. 16.

negotiations with the judgment creditors, believing them to have full power to stay the sale. These negotiations resulted in the following memorandum being signed on the 15th of February, 1855, by * the plaintiffs and three other persons, and given * 241 to the judgment creditors.

“ In consideration of Mr. Joel consenting to postpone the sale under the execution against Mrs. Elizabeth Macdonald, and assigning his claim thereunder as we shall request, in consideration of his and the other creditors under named taking payment of their debts as hereinafter mentioned, we jointly and severally undertake to guarantee the payment of the several debts owing from Elizabeth Macdonald, by three equal instalments, at twelve, twenty-four, or thirty-six months from the date hereof, with interest at 5*l.* per cent per annum, viz., Mr. Joel, 2720*l.*; E. and H. Wright, 4300*l.*; Abraham Nelwich, 500*l.*; E. Lazarus, 650*l.*; Mr. Marcus, 600*l.* And we also jointly and severally agree with each creditor to execute a bond for securing the same on request. A satisfactory policy, if possible, to be effected on Mrs. Macdonald's life, and kept up, and the policy deposited with Mr. Joel, as further security. Dated the 14th of February, 1855.”

Taking with him the memorandum thus signed, the plaintiff Cooper, accompanied by one of the judgment creditors, went at once to the auctioneer, who had then sold a few lots, and directed him to discontinue the sale. This, however, the auctioneer declined to do, alleging that the consent of the judgment creditors was not sufficient, and that it required the consent of the trustees. The sale accordingly went on, and the whole of the property was sold. Two hours later, on same 15th day of February, 1855, the plaintiff Cooper, through his solicitor, served upon the judgment creditors a notice that the arrangement made with them that morning, and the agreement or undertaking which the plaintiffs then signed, had become null and void, inasmuch as the consideration * for which they were induced to enter into such * 242 arrangement and to sign such agreement had failed, and that the parties thereto would not hold themselves bound thereby.

In February, 1856, the five judgment creditors brought five several actions against the plaintiff Cooper, upon the guarantee, to recover the first instalment on their debts.

Cooper and Matthews thereupon filed the bill in the present suit against the judgment creditors and the three other sureties, praying that the guarantee of February, 1855, might be declared to be inoperative and void ; that the same might be cancelled ; and that the judgment creditors might be restrained from proceeding upon it at law against the plaintiffs.

On the 18th of November, 1857, the plaintiffs moved for an injunction to stay the proceedings in the actions, when the motion was ordered to stand over until the trial of the five actions. The plaintiffs in the actions at law, however, believing that Cooper, in case of the verdicts going against him, could not pay, determined not to prosecute the actions for the present, and in April, 1859, judgment of *non pros* for not proceeding to trial after notice was signed in each of the five actions.

In July, 1859, the cause came on to be heard, when the Master of the Rolls made the decree appealed from.

Mr. R. Palmer and *Mr. Hardy*, for the plaintiffs, in support of the decree. — Upon failure to stop the sale, for the purpose of stopping which the guarantee was given, the guarantee was * 243 at an end. It cannot be said that the guarantee was to * be given in case the execution creditors consented to stop the sale, although such consent was ineffectual to bring about the result which the plaintiffs had in view in seeking it.

Mr. Selwyn and *Mr. Speed*, for the judgment creditors. — This is not a case in which either wilful misrepresentation or fraud in procuring the guarantee is insisted upon on the part of the plaintiffs. The only question is the legal one, of the construction of the instrument itself. That is exclusively for the determination of a Court of Law ; and though no legal defect is apparent on the face of the guarantee, this Court has no jurisdiction in the case. The fact that five actions have been brought is not a reason for the interference of a Court of Equity. Proceedings at law upon bills of exchange are often open to the same objection, but recourse has never been had to this Court upon such a ground. Courts of Law have ample powers to consolidate the actions. The mere possibility of losing evidence by which some future action upon the guarantee might be met, is not sufficient to give jurisdiction to this Court. That ground, if sufficient, would have been insisted upon

in *Thiedemann v. Goldschmidt*, (a) *The Derbyshire, Staffordshire, and Warwickshire Railway Company v. Serrell*, (b) *Thornton v. Knight*, (c) and other similar cases. To provide against that risk, a bill to perpetuate testimony would have been the proper proceeding. It is alleged that the consideration for the guarantee failed, but that is a defence available at law. The contract was, not that the plaintiffs' liability should be conditional on the prevention of the sale, but that they should be liable upon the judgment creditors consenting * to stop the sale. That condition was * 244 performed, and there was no representation that those creditors had the absolute power of stopping the sale. There is no ground, therefore, for saying that the instrument is void, or that the Court has jurisdiction to direct it to be delivered up. They cited *Simpson v. Lord Howden*, (d) *Hayward v. Dimsdale*, (e) *Ryan v. Mackmath*, (g) *Jackman v. Mitchell*, (h) *Franco v. Bolton*. (i)

Mr. Stiffe, for other parties.

Mr. Hardy, in reply. — Admitting the question of construction to be a purely legal one, that question was brought before a Court of Law, and the defendants declined to avail themselves of the proceedings to have it decided. It must, therefore, be considered that they have no defence at law, and that the action should not have been brought. That is sufficient to give jurisdiction to this Court to interfere by injunction. Again, though fraudulent misrepresentation is not alleged against the defendants, the evidence shows that they, being under a misapprehension, as to the extent of their rights and powers under their judgments, made representations to the effect that they had power to stop the sale, and that the sale should be stopped; and upon this ground alone the Court had jurisdiction to make the decree appealed from.

THE LORD CHANCELLOR. — I think that the decision of the Master of the Rolls must be affirmed. I do not, however, assent to the proposition, which has been advanced in argument, as to the

(a) *Ante*, p. 4.

(b) 2 De G. & Sm. 353.

(c) 16 Sim. 509.

(d) 3 Myl. & Cr. 97.

(e) 17 Ves. 111.

(g) 3 Bro. C. C. 15.

(h) 13 Ves. 581.

(i) 3 Ves. 368.

* 245 jurisdiction of the Court in such cases, and which * amounts in substance to this, that a Court of Equity will interfere to restrain an action whenever the action ought not to be brought. If that was the rule, hardly any dispute could arise upon a contract, which might not be drawn into a Court of Equity.

But in this case there are peculiar circumstances, giving to this Court jurisdiction to interpose by granting an injunction and directing the instrument to be delivered up. I have no doubt that substantially a material representation was made which was untrue. I will not enter into the conflict which there is in the evidence, but without assuming any positive agreement on the part of the judgment creditors, I have no doubt that there were representations to the effect that they had power to stop the sale, and that the sale should be stopped. I am of opinion that these representations were untrue or incorrect, and that on this ground, at all events, the Court has jurisdiction to interpose in the way which I have mentioned. It is clear that the plaintiffs never would have given the guarantee unless they had believed that the sale was to be stopped. *Res ipsa loquitur*. It is evident that both sides believed that the sale was to be stopped. Neither side contemplated that the consent of the trustees was necessary, and therefore this provision was not introduced. But the defendants must have been aware that the plaintiffs would have given no guarantee unless they believed that the sale was to be stopped. The sale proceeded, and the proceeds of the sale went to the judgment creditors, leaving the plaintiffs in the same situation in which they were before they gave the guarantee. Under such circumstances it was contrary to equity and good conscience to put the guarantee in force.

Without, therefore, acceding to any such wide proposition * 246 * as was laid down by *Mr. Hardy*, this appears to me a case in which the guarantee should be delivered up. The defendant may, if he insists on it, have the decree varied, and made to correspond with the prayer of the bill, but I may say that this will make no difference as to the costs of the appeal.

MOULTON v. EDMONDS.

1859. December 17, 19, 21. Before the Lord Chancellor Lord CAMPBELL.

In a vendor's suit for specific performance the abstract showed a seisin in fee in B. in 1798, and a devolution of the title both legal and equitable from him to the plaintiff, and uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, and that by mesne conveyances the premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account-books of deceased solicitors who had been concerned in framing the recited deeds, in which charges were made for preparing those deeds and for attending to witness their execution. *Held*, that the recital coupled with the extracts was good secondary evidence of the execution and contents of the missing deeds.

The abstracted deed of 1815 also contained recitals of deeds purporting to be mortgages of the premises in question by B., and subsequent reconveyances to him by the mortgagees. These deeds were also missing, but were abstracted in an abstract produced to the purchaser, which had been made out and examined by a conveyancer in 1815, and from which the recitals in the deed of 1815 had been prepared. *Held*, that the abstract of 1815 was sufficient secondary evidence of the execution and contents of the missing deeds.

THIS was an appeal against an order of the Master of the Rolls, by which he refused to vary the certificate of the chief clerk, finding in a suit instituted by a vendor against a purchaser for a specific performance, that a good title could be made to the land comprised in an agreement between the parties, dated 25th of March, 1857.

The objections made by the purchaser were that certain recited deeds were not produced, and that the secondary evidence of them was not of such a kind as to ensure its being always accessible on future dealings with the property.

The facts of the case, and the principal arguments * upon * 247 the appeal, sufficiently appear in his Lordship's judgment.

Mr. R. Palmer, Mr. Selwyn, and Mr. Lonsdale, for the defendant, the appellant, cited *Bryant v. Busk*, (a) *Cooper v. Emery*, (b) *Roberts v. Croft*, (c) *Doe d. Rogers v. Brooks*. (d)

(a) 4 Russ. 1.

(c) 24 Beav. 223; 2 De G. & J. 1.

(b) 1 Phil. 388.

(d) 3 Ad. & El. 513.

Mr. Follett, Mr. W. W. Cooper, and Mr. Southgate, for the plaintiff, referred to *Hillary v. Waller*, (a) *Preston on Abstracts*, (b) *Sugden's Vendors and Purchasers*, (c) *Coussmaker v. Sewell*, (d) *Nouaille v. Greenwood*, (e) *Prosser v. Watts*, (g) *Colyer v. Finch*, (h) *Alexander v. Crosby*. (i)

Mr. Palmer replied.

Judgment reserved.

December 21.

THE LORD CHANCELLOR. — In my opinion the abstract and the evidence adduced support this decision.

The defendant admits that he is an unwilling purchaser; but, nevertheless, he has a right to insist on a title for sixty years;¹ and not only a safe, holding title (which he hardly denies has been offered to him), but a marketable title,² capable of * 248 strict proof, enabling * him easily to resell, whenever he may have a mind so to do. The plaintiff, the vendor, alleges that he shows one John Jones to have been seised in fee of the premises in 1798, more than sixty years ago, and that a good title, both legal and equitable, is deduced from John Jones to himself, which he is ready to make over to the defendant, the purchaser. The seisin in John Jones is evidenced by his occupation of the premises; by his entering in 1798 into a contract, as owner, with a builder, to erect a mill for him on the premises, which was erected, and in which he carried on his business; by his having, as owner, in March, 1799, redeemed the land-tax charged on the premises, and by the uninterrupted enjoyment ever since of those under whom the plaintiff claims.

This seisin is not very strenuously questioned by the purchaser, who allows that it would be unassailable, were it not that in a deed executed in 1815, and set out in the abstract, there is a recital of

(a) 12 Ves. 252.

(c) 11th ed., pp. 458, 460, 486.

(b) Vol. 1, pp. 20, 252, 253.

(d) Sug. V. & P. App. p. 1095, No. 12.

(e) T. & R. 26.

(h) 5 H. L. Cas. 905.

(g) 6 Madd. 59.

(i) 1 J. & Lat. 666.

¹ See 1 Sugden V. & P. (8th Am. ed.) 365, 366; 1 Dart V. & P. (4th Eng. ed.) 271.

² See 1 Dart V. & P. (4th Eng. ed.) 75, 85, 395; 1 Sugden V. & P. (8th Am. ed.) 386, note (d); Swayne v. Lyon, 67 Penn. St. 436.

some other deeds respecting the premises alleged to have been executed before the sixty years. Those deeds, if credited, show that in 1779 one Goodeve was seised in fee of the premises, and that by mesne conveyances the fee-simple came to John Jones. But the objection is, that the deeds so recited are not produced. A controversy arose at the bar, whether it was necessary to produce or to prove the execution of these deeds, which were never in the possession of the vendor. The vendor's counsel contended that it was not necessary for him to go further back than sixty years, for if it were, by reason of recitals of older deeds, there might be a necessity to go back to the time of the Anglo-Saxons, each deed produced reciting a deed more ancient; while the purchaser's counsel took the distinction between recitals in deeds executed within the sixty years containing recitals of earlier deeds, and deeds executed further back than sixty * years * 249 containing such recitals. Perhaps the test may be, whether the recited deeds not produced cast any reasonable suspicion upon the title shown by the deeds produced.

But this controversy must be settled hereafter, because in the present case it is allowed that a due search has been made for the recited deeds, and that there is sufficient secondary evidence of the execution of those deeds and of their contents, — subject to this objection, which was strongly pressed, that part of this secondary evidence consisted of affidavits of professional men, which set out extracts from the account-books of deceased solicitors concerned in framing those deeds, making charges for preparing the deeds, and for attending to witness their execution.

This objection was founded upon the following supposed canon in conveyancing, that “to make out a marketable title all the evidence must be portable, — such as may be carried into the market and shown to those who may be inclined to buy, and such as may be hereafter bodily transferred from buyer to buyer.” Here, it was said, the solicitors' books referred to in the affidavits cannot be handed over with the documents mentioned in the abstract, and therefore a marketable title is not made out. Were the writings referred to in the affidavits records, or in any way *publici juris*, so that access to them might be obtained as of right, it was conceded that the objection would not hold, — but it was urged that a purchaser would have no right to claim possession, or an inspection, of the solicitors' books relied upon, and he would

be in no situation to make out a marketable title to another purchaser.

* 250 No authority whatever was cited for this supposed * canon ; if sound, it would be equally applicable to secondary evidence of deeds executed within the sixty years, and it would render lands and houses unsalable wherever, by an accidental fire, recent deeds conveying them had been accidentally destroyed. This canon is likewise at variance with the established practice of conveyancing ; for pedigrees in an abstract are proved by a reference to entries in family Bibles, and in surgeons' books, which are not handed over with the abstract ; and identity of parcels is proved by a reference to maps which are not in the custody of the vendor, and which he does not hand over to the purchaser, nor give any certain means to the purchaser to acquire. If such objections are to prevail, the transfer of real property in England would not only be difficult but would become often impossible, where there is an unwilling purchaser.

The next objection (more strenuously relied upon) was, that the abstract does not show a proper deduction of title from John Jones to the plaintiff, because he claims under a conveyance executed, in 1815, by the assignees of John Jones, then a bankrupt, and that this deed recites certain deeds, by which the premises in question were mortgaged by John Jones, and were reconveyed to him by the mortgagees, — which deeds have not been produced, and are not forthcoming.

The vendor's counsel first relied upon the new Statute of Limitations, according to which no claim can be made to realty more than twenty years after the right has accrued, and here there has been an undisturbed enjoyment, according to the deed of 1815, for forty-four years. But I do not think that the new Statute of Limitations in any respect abridges the period of sixty years, for which previously a good title must have been proved by
* 251 * the vendor.¹ There are exceptions to the bar by lapse of time, by reason of infancy, and other disabilities, and the estimated duration of the life of man is still regarded as measuring the period during which the title must be proved, although attempts have been made by very distinguished persons to abridge this period, so as to facilitate the transfer of real property.

¹ See 1 Sugden V. & P. (8th Am. ed.) 365.

But I am of opinion that we have here sufficient secondary evidence of these deeds, and that this evidence is admissible. During the argument I had understood a statement to be made, in opening the appellant's case, that there was no evidence of any search for these deeds; upon which I suggested the expediency of the inquiry going back to the chief clerk, that such a search might be proved. Subsequently, however, on the part of the plaintiff, the respondent, the most ample evidence was adduced of a search among the papers of all persons who could reasonably be supposed to have been in possession of these deeds, if they were extant, and none of them can be found, although there is extant, and there has been shown to the purchaser the abstract of the title made out and examined by a conveyancer in the year 1815, from which abstract the deed of 1815 had been drawn, and in which abstract these missing deeds are abstracted.

The loss of the deeds being proved, the question therefore arises, whether there is not sufficient secondary evidence of their having been executed, and of their contents.

The recital in a deed is, generally speaking, evidence only between parties and privies; but various authorities were cited before me to show that in a case of this sort, the recital of a deed in a deed has been received as secondary evidence of the recited deed;¹ and as there has * been an enjoyment of forty-four years * 252 under these deeds, I shall presume that they were executed.

The chief peril pointed out by the appellant's counsel to the purchaser from these non-appearing deeds was, that they might have been pledged as a security for money borrowed, by way of equitable mortgage, and that the equitable mortgages may hereafter start up and claim a charge upon the premises against the purchaser, who, by the recitals, must be supposed to have had notice, which would deprive him of his advantage from being clothed with the legal estate.

But I must say that this peril seems to me to be imaginary and chimerical. Forty and four years have elapsed since there could have been any such fraudulent deposit by way of equitable mortgage; and if such an equitable mortgagee should now start up, he will have formidable difficulties to encounter in explaining his laches, and in encountering the Statute of Limitations. *Mr. Palmer*

¹ See 2 Sugden V. & P. (8th Am. ed.) 417.

admitted that an abstract need not guard against remote possibilities,—and surely this long dormant equitable mortgage is a very remote possibility,—whereas there is a great probability that the missing deeds, which were extant in 1815, and were then abstracted and recited, have since perished from time and accident.

Particular stress was laid on the non-production of the will of John Osborne, which is mentioned in the deed of 1815. But, although there was a sweeping requisition after the delivery of the abstract, for the production of “all the deeds, wills, and other documents, recited or referred to in the deed of 1815,” when the inquiry took place before the chief clerk, this will was never asked for or alluded to; and I make no doubt that if it had been
 * 253 asked for it might have been obtained, and * would have been produced in half an hour from Doctors’ Commons.

Since 1815, when the legal and equitable estate vested in the Coopers, (a) there is a regular deduction of title by deeds produced, duly executed, down to the present plaintiff. This would not be enough without going further back; but I think there is sufficient evidence that the fee-simple proved to be in John Jones in 1798, vested in the Coopers in 1815, so as to make the title offered by the vendor such as the purchaser was bound to accept.

This appeal must be dismissed with costs.

OFFEN v. HARMAN.

1859. December 17, 20. Before the LORDS JUSTICES.

A settlement contained a power which was to be executed by A., with the consent of B., “such consent to be signified by some deed to be duly executed by him, and not otherwise,” to release certain estates from charges in favor of the younger children of A., and substitute others in their stead. The donee of the power executed it by deed, which was not, however, executed by B. till nine months after its execution by A., but evidence was produced that a draft of the deed, purporting to be an execution of the power by A., had been shown to B. before it was executed by A., and that B. had then given his parol consent thereto: *Held*, that the power had been validly executed.

(a) The property was conveyed to the Coopers, by the deed before referred to as having been executed in 1815, and as being set out in the abstract.

THIS was an appeal from the decision of the Master of the Rolls, dismissing with costs a summons taken out by the defendant to vary the chief clerk's certificate made in a vendor's suit for the specific performance of a contract for sale of real estate, and certifying that a good title was made to the premises contracted to be sold from the 26th of April, 1858.

The principal question upon the appeal arose out of the following circumstances : —

The title to the premises in question was derived under * the marriage settlement of Edward Knight the younger, * 254 dated the 2d of March, 1840, by which certain freehold estates were conveyed to uses, under which Edward Knight the younger was tenant for life, and had also power to release a portion of the settled estates, called the Great Moatenden farm and premises, from a certain charge for portions in favour of the younger children of the marriage, upon substituting for it any other estates of competent value to which he might be entitled under an indenture dated in 1815 ; but it was provided that the substitution should not take place except with the previous consent of the trustees for the time being of a term of 3000 years in the settled premises, “ such consent to be signified by some deed to be duly executed by the trustees respectively, and not otherwise.”

By an indenture dated 17th of December, 1857, Edward Knight the younger conveyed to Mr. Offen (the plaintiff in the present suit) the Great Moatenden farm and premises, revoking by the deed the uses of the indenture of the 2d of March, 1840, so far as they affected those premises. The trustees of the term of 3000 years were made parties to the deed of December, 1857, for the purpose of thereby signifying their consent to the substitution of other estates to which E. Knight the younger was entitled under the deed of 1815, for those at Moatenden.

The Great Moatenden farm and premises formed the subject-matter of the contract in the present suit, and in the abstract of title furnished to the defendant, the indenture of the 17th of December, 1857, was stated to have been duly executed by all the parties, including the trustees for the time being of the term of 3000 years ; but on the abstract being compared with the deed itself, it appeared that that instrument had not been executed by F. G. Austen Leigh, one of those trustees, * until the * 255 month of October, 1858, nine months after the date of the

conveyance, and only a short time before the institution of the present suit.

It had been objected before the chief clerk, on the part of the defendant, that the indenture of the 17th of December, 1857, was not a valid execution of the power of substitution by E. Knight the younger, inasmuch as the trustee F. G. Austen Leigh had not at that time given his consent to the substitution of other estates, and that the execution of the indenture by him nine months after it had been executed by E. Knight the younger could not operate as such a consent as was required by the indenture of March, 1840.

Upon the present appeal coming on in the first instance before the full Court, on the 25th of November, 1859, the petition of appeal was directed to stand over, in order that evidence of contemporaneous assent by F. G. Austen Leigh to the execution of the indenture of the 17th of December, 1857, which it was alleged could be furnished, might be produced.

Upon the appeal being now again brought on for hearing before the Lords Justices, evidence was produced that F. G. Austen Leigh the trustee, although he had not executed the indenture of December, 1857, till long after it was executed by E. Knight the younger, had been informed of the intention of E. Knight the younger to make the proposed substitution, and had seen a draft of the deed and given his consent by parol thereto, before the conveyance to Offen, the plaintiff, was prepared.

Mr. Selwyn and Mr. Pemberton, in support of the appeal. — Inasmuch as to the exercise of the power of substitution,
 * 256 * the deed of March 2, 1840, in precise and express terms required the consent of the trustees to be signified by some deed to be duly executed by them respectively, and not otherwise, the mere parol assent by F. G. Austen Leigh, given long before he had executed the deed, was insufficient to give validity to the exercise of the power; nor could the execution of the indenture by F. G. Austen Leigh, so long after it had been executed by E. Knight, have the effect of making it valid as an exercise of the power.

They referred to *Bateman v. Davis*, (a) *Hawkins v. Kemp*, (b) *Wright v. Wakeford*, (c) *Freer v. Hesse*, (d) *Sugden on Powers*. (e)

(a) 3 Madd. 98.

(d) 4 De G., M. & G. 495.

(b) 3 East, 410.

(e) Page 339.

(c) 17 Ves. 454.

Mr. Roundell Palmer and *Mr. Freeman*, in support of the decision at the Rolls.

They referred to *M'Queen v. Farquhar*, (a) *Ex parte Tuvener*. (b)

Mr. Pemberton replied.

THE LORD JUSTICE KNIGHT BRUCE. — Whether less than the whole materials at the present moment before the Court of appeal would have been sufficient to establish a due execution of the power by the deed of substitution of December, 1857, it is unnecessary to determine; but, seeing what the whole materials now are, I am of opinion that a due execution of the * power by * 257 the deed has been sufficiently shown; This, however, is of course apart from the question, when the due execution was first shown by the plaintiff.

The Lord Justice TURNER concurred.

In the Matter of The LONDON AND BIRMINGHAM FLINT GLASS AND ALKALI COMPANY (LIMITED) and of The JOINT-STOCK COMPANIES ACT, 1856 & 1857.

Ex parte FREDERICK ROBERT WRIGHT, on his own behalf and also as the Attorney duly authorized of ALFRED JAMES WATERLOW, WALTER BLANDFORD WATERLOW, and SYDNEY HEDLEY WATERLOW.

1859. June 3. Before the Lord Chancellor Lord CHELMSFORD.

An assignee of a judgment debt of less than 50*l.* against a limited company on which execution had issued, with a return of *nulla bona*: *Held*, entitled under a power of attorney contained in his assignment to petition to wind up the company.

Seemle, that an equitable debt will support such a petition.

(a) 11 Ves. 467.

(b) 7 De G., M. & G. 627.

THIS was an appeal from the decision of Mr. Commissioner SANDERS dismissing a petition for winding up the above company, which was formed in February, 1857, and registered as a limited company under the provisions of the Joint-stock Companies Act, 1856, its objects being defined by its deed to be the erection of flint glass and alkali works at Birmingham or elsewhere in England, or the acquisition by purchase of such works, and carrying on the same. The company carried on business for some time, but fell into difficulties, and on the 18th of March, 1858, they entered into an agreement with the Islington Glass Company * 258 (Limited) to sell * to the latter company the benefit of an agreement under which the former company held their works, and also to sell the good-will of the business to the latter company. The former company had since the date of the agreement ceased to carry on business, and was largely indebted. On the 29th of March, 1858, Messrs. Waterlow, who were creditors of the company, recovered judgment against them for 25*l.* 16*s.* 9*d.*, and obtained a writ of *fi. fa.* On the 6th of January, 1859, Messrs. Waterlow assigned their judgment debt to the appellant with a power of attorney, authorizing him to sue in their names.

On the 2d of April, 1859, the appellant presented a petition in his own name and as the attorney of Messrs. Waterlow, seeking to have the company wound up, but the commissioner dismissed the petition, on the grounds that the debt due to the appellant was insufficient in amount, and was, moreover, merely equitable. The appeal had been brought before the Lords Justices, who suggested that the case should be heard by the Lord Chancellor.

Mr. De Gez, in support of the appeal. — The commissioner thought that the appellant was not a creditor within the meaning of the Act, inasmuch as he was the assignee of a legal debt, and therefore a creditor in equity only. But the 68th section of the Joint-stock Companies Act, 1856, provides, that a company may be wound up whenever an execution issued on a “judgment, decree, or order” obtained in any Court in favour of any “creditor” in any suit is returned unsatisfied, showing, therefore, that the word “creditor” includes a person to whom a debt is due which is recoverable in equity merely. The greatest injustice would arise if any other construction were put upon the Act; for an * 259 * equitable creditor, having now no remedy except under

the act, would then be wholly without redress. *Carpenter v. Thornton.* (a) There is no analogy in this respect between proceedings under the Winding-up Acts and those in bankruptcy, for in the latter case an equitable creditor has a right to sue in a Court of Equity. Nor is the debt insufficient in amount. The restriction in that respect is contained in the first branch of the 68th section only, and applies merely to debts on which judgment has not been recovered.

The respondents did not appear.

THE LORD CHANCELLOR. — The second branch of the 68th section of the Act does not require that a judgment debt should be of any specified amount to constitute a ground for winding up a company, when there is no return to the writ of execution. It is only with respect to an unsatisfied demand, not upon a judgment, that a limit is fixed requiring it to be not less than 50*l*. Then, with regard to the nature of the debt, *Mr. De Gex* has argued, with a great deal of reason, that the creditor may be either a legal or equitable creditor, and that it must have been the intention of the legislature to include equitable debts. There might however be a question whether a person who does not obtain a decree of the Court of Chancery, but is only an equitable creditor, by taking an assignment of a judgment debt at law, is a creditor within the 69th section so as to be competent to petition alone. It is not necessary to decide this on the present occasion, as the petition is here presented in the names of the legal creditors as well as of the equitable creditor.

Winding-up order made.

(a) 1 B. & Ald. 52.

* 260 * *Ex parte* JOHN WILLIAM HOLDERNESS.

In the Matter of JOHN WILLIAM HOLDERNESS, a bankrupt.

1859. July 4. Before the LORDS JUSTICES.

A bankrupt had, a short time before his bankruptcy, represented to his bankers that he was the owner of three ships in the course of building abroad. Some time afterwards his account with them being largely overdrawn, they prepared an agreement for him to sign, whereby he agreed to mortgage the ships to them for the floating balance. He had previously, however, sold the ships to his brother, subject to an agreement for the payment to himself of any profit on a resale. He signed the proposed memorandum without mentioning the fact of the sale. *Held*, that although the bankers made no further advance on the security of the memorandum, the bankrupt had been guilty of a suppression, which could not be overlooked on the question of his certificate, and that it had been rightly suspended for three years without protection.

THIS was an appeal from the decision of Mr. Commissioner AYERON, suspending the appellant's certificate of conformity for three years without protection, and at the end of that period granting it as of the third class only.

The bankrupt was a timber merchant and commission agent at Hull, and the ground of the commissioner's decision was, that the bankrupt had contracted a debt by fraud, in obtaining from the petitioning creditors forbearance of their debt, by agreeing to execute to them a mortgage of a ship which he had already sold.

The petitioning creditors were the bankers of the bankrupt, and in April, 1858, his account with them being largely overdrawn, they pressed him for security. He had some time before represented to them that he was the owner of three vessels which were in the course of being built for him at Richibuctoo; and the bankers, presuming that this state of things continued, prepared a memorandum for him to sign, purporting to be an agreement by the bankrupt to assign those vessels to them by way of mortgage for the balance of his banking account, not exceeding 14,000*l*.

The bankrupt had previously, in fact the 16th of November, 1857, agreed to sell the vessels to his brother Thomas Hunter Holderness, but it was, as he now deposed, part of the agreement that, in the event of the vessels, when resold by Thomas Hunter

Holderness, realizing a larger price than that at which he had bought them, the profit should be paid to the bankrupt.

The bankrupt signed the proposed memorandum on the 30th of April, 1858, without mentioning to the petitioning creditors the fact of the sale to his brother. The balance, however, due from him to the petitioning creditors had not been increased, nor had he incurred any new debt with them after the memorandum was signed. He now deposed that he had hoped to induce his brother to postpone his security to that of the petitioning creditors.

The adjudication of bankruptcy took place on the 10th of June, 1858.

Mr. Bacon and *Mr. Baggally*, in support of the appeal, submitted that the bankrupt had not made any fraudulent representation. He had made in substance a first equitable mortgage to his brother, retaining an interest in the vessels. When the petitioning creditors urged him to sign a memorandum which they had prepared, there was therefore an interest for it to operate upon, and they made no inquiry as to incumbrances. Nothing at all events was done by the bankrupt to merit so severe a sentence.

* *Mr. Selwyn* and *Mr. Eddis*, for the assignees, were not * 262 called upon.

THE LORD JUSTICE KNIGHT BRUCE — It does not appear to me that the creditors whose particular interests are now represented before the Court have suffered in any way by what the bankrupt has done. It does not appear that there has been any important delay even in consequence of what took place, but unfortunately, not alone by what occurred in April, 1858, but also by what had taken place in the latter part of the preceding year, the bankers were led to believe that the bankrupt's interest in the three vessels referred to was not subject to any incumbrance whatever. However little they may have suffered, it is impossible for the Court to pass over the suppression of truth, into which, under some pressure it is true, the bankrupt has allowed himself to be surprised. It will therefore be impossible to adopt a conclusion, which would be one of so bad an example, as to mitigate the sentence pronounced. Of course the mere apprehension of a bad example would not justify the Court in maintaining a sentence which it thought there was

solid ground for varying, but in the present case I fear there is no such solid ground, however painful in the circumstances it may be to come to that decision.

At the same time I do not see why the certificate, when granted, should be of the third class. I think that, if my learned brother does not dissent, it may be of the second class, which, however, will by no means indicate our approval of the course that the bankrupt has taken.

* 263 * THE LORD JUSTICE TURNER. — I concur with reluctance; and although I cannot consent to any variation of the judgment other than that of altering the class of certificate, I extremely disapprove of the pressure exercised upon the bankrupt by the bankers.

Ex parte CHARLES ROTHSAÿ FRAMPTON.

In the Matter of CHARLES ROTHSAÿ FRAMPTON.

1859. August 4. Before the LORDS JUSTICES.

Where a person on leaving this country has authorized another, either in writing or verbally, to act for him generally in his absence, the latter has authority to instruct a solicitor to appear on behalf of the former to show cause against an adjudication of bankruptcy against him.

THIS was an appeal from the decision of Mr. Commissioner HILL, refusing to hear cause shown against an adjudication of bankruptcy against the appellant, on the ground that the person appearing to show cause on behalf of the appellant was not duly authorized in that behalf.

The petition of appeal purported to be that of the bankrupt, and was presented on his behalf by a solicitor of the Court of Bankruptcy, who took upon himself to act as the bankrupt's solicitor. He had obtained from their Lordships *ex parte* an order authorizing him to sign the petition on behalf of the petitioner.

The petition and the affidavits in support of it stated that the appellant only attained the age of twenty-one years in February, 1859, and had not at any time been a trader within the meaning

of the bankrupt laws; that in June, 1859, he left this country and went to reside in *Canada; that at the time * 264 of his leaving this country he had satisfied and discharged, with some trifling exceptions, all fair and just claims upon him, but that there remained some demands which had been made against him for sums which were either not legally due to any extent, or were in excess of what, if any thing, was actually due from the appellant; that on leaving this country as aforesaid he had constituted his uncle Mr. Edward Frampton his general agent for settling such of his affairs as remained to be settled in this country, and had left in the hands of his uncle moneys exceeding in amount all the debts due or claimed to be due from him, and that the appellant's departure was not for the purpose of defeating or delaying his creditors or any one of them.

It appeared that on the 4th of July, 1859, Mr. Edward Frampton received notice of the adjudication from the messenger of the District Court, accompanied by a caution not to part with any of the appellant's moneys.

On the 9th of July, 1859, Messrs. Bubb & Co., who were the appellant's general solicitors, and were instructed on that occasion by Mr. Edward Frampton, gave notice to the registrar of the Court, and to the solicitor to the petitioning creditors, that it was intended to dispute the adjudication on the appellant's behalf, and the 14th of July was appointed for that purpose.

A sitting was held accordingly on the 14th of July, and was adjourned successively to the 19th and 25th and 26th of July, on which occasions (Messrs. Abbot, Lucas, and Leonard, Messrs. Bubb's agents at Bristol, having been instructed by the latter to appear) Mr. Abbot appeared for the purpose of showing cause on the appellant's behalf against the adjudication. The solicitor of *the petitioning creditors objected that Mr. Abbot * 265 had no authority from the appellant to appear for him.

The commissioner allowed the objection, saying that there ought to be express authority, for that if implied authority were sufficient it might happen that many persons would have equal authority to make or to oppose such an application, and that in such an event the Court would have difficulty in deciding as to whether the name of the bankrupt should be used to support or to defeat the adjudication. That in this case Mr. Clifton, a solicitor, had stated to the Court that he was acting for the alleged bank-

rupt up to the time of his departure, but had taken no part in the present application. The commissioner thought that the questions to be considered were, first, whether or not any implied authority would be sufficient to give the applicant a *locus standi*; secondly, whether a sufficient implied authority had been shown to exist in Mr. Edward Frampton, or if not in him, then in Mr. Bubb; and thirdly, if in Mr. Bubb, whether it had been executed in due time. The main question no doubt was, whether any authority short of express agency was sufficient as the law now stood. A provision which would enable the Court to hear a person in opposition to the adjudication where the alleged bankrupt was abroad, and could have no notice of proceedings in bankruptcy until after they might have deeply affected his interests, would be desirable to the interests of justice. But the question was not what the law should be, but what it was. The Consolidation Act, and the subsequent Acts amending it, controlled, and often with great particularity, the practice of the Court; and with a view of leaving as little as might be to its discretion, the Consolidation Act provided that rules and orders for its government should be made. It would be neither

right nor decorous to go far beyond the letter of the Acts,
 * 266 unless * under the guidance of the rules and orders, none of which applied to the present question. Now the words of the 104th section, giving the right to make the application, were limited to "such person" as had been "adjudged bankrupt." This was in conformity with the general policy of the law relating to bankrupts, which was very jealous of the interference of strangers; and although exception was made in favour of creditors, yet that was clearly because their interests were affected by the adjudication. With regard to the hardship of dealing with the interests of a person behind his back, the legislature must have contemplated the existence of this hardship, for the only period given to the alleged bankrupt as of right for disputing the adjudication before advertisement was seven days; and the indulgence of the Court, if indulgence should be exercised, was limited to fourteen additional days. Thus not only the bankrupt, but the Court, was kept within very strict bounds, yet it was quite obvious, that twenty-one days could not much avail a bankrupt (if he were meant to exercise any will upon the subject) who was absent from the country. Much light was thrown on the subject by the 223d section. It was also worthy of remark that the attention of the legis-

lature had been again directed to this matter, for by the 17 & 18 Vict. c. 118, § 24, the twenty-one days mentioned in the 223d section were enlarged to two calendar months. On the whole, therefore, the commissioner said he could not resist the impression that it was considered by the legislature that the interests of individual debtors must give way to the interests of creditors, which were often much advanced by those powers of the Act which enabled the Court to place the estates of bankrupts without much delay under the protection of its own officers.

The following was the commissioner's memorandum * of * 267 the decision under appeal : —

“ Memorandum. This being the further adjourned sitting for showing cause against the adjudication of bankruptcy against the said Charles Rothsay Frampton, Mr. Stone, of counsel for the petitioning creditors, again appearing for them, and^a Mr. Abbot, as solicitor for the bankrupt, this Court doth order, that — the bankrupt having left this country and gone to America, and there being no agent on his behalf entitled to appear and be heard against the adjudication, — the application made on behalf of the said bankrupt to be heard in disputing the said adjudication be refused, but that the insertion of the advertisement in the London Gazette be postponed until the 2d second day of August next, for the purpose of affording an opportunity for an appeal against such refusal.”

Mr. Bacon and *Mr. De Gez*, in support of the appeal. — The affidavit of Mr. Edward Frampton states distinctly that the appellant constituted him the appellant's general agent for settling such of his affairs as remained to be settled. This is quite sufficient to give authority to Mr. Edward Frampton to dispute an adjudication of bankruptcy made against his principal. In *Howard v. Bailie*, (a) which, although overruled on another point, has always been considered law on this, Lord LOUGHBOROUGH said: “The authority to pay debts, upon the first view of it, seems to be more confined and specified than the authority to collect the effects; but if we consider it more attentively, we shall find that the effect of this part of the instrument is to commit the application of the personal estate in payment of debts to those attorneys absolutely and exclusively; and it will also be found, without the assistance of

general words, that an authority of this nature necessarily
 * 268 includes medium * powers, which are not expressed. By
 medium powers, I mean all the means necessary to be used,
 in order to attain the accomplishment of the object of the principal
 power, which in this case is the paying, satisfying, and discharging
 the testator's debts. It must occur to every man who reflects upon
 the nature of this trust, that numberless arrangements would be to
 be made by those who were to execute it, accounts to be settled,
 disputed claims to be adjusted, unjust ones to be resisted, suits at
 law and in equity to be instituted and defended, payments to be
 postponed or installed, according to the state of the fund, and per-
 haps, if the estate should be discovered to be insolvent, a distrib-
 ution to be made among the creditors in equal degree, *pari passu*.
 These and many other subordinate powers, though not expressly
 given, as in the former part of the instrument, must be understood
 to be included in this power to pay debts ; and I take it to be clear
 that in the construction of such powers they are included." The
 authority spoken of in *Howard v. Baillie* was less extensive than
 that in the present case.

They also referred to *Ex parte Tarleton*, (a) *Ex parte Crow-*
ther, (b) *Ex parte Lane*, (c) *Ex parte Rhodes*. (d)

Mr. Roxburgh, for the petitioning creditors, read the commis-
 sioner's judgment to the effect above set out, and relied upon the
 grounds therein stated.

THE LORD JUSTICE KNIGHT BRUCE. — The petitioner must be
 taken to have been out of Europe during the whole period
 * 269 which it is here material * to take into consideration. In
 his absence he was adjudicated a bankrupt. After this, a
 solicitor entitled to practise in the Court of Bankruptcy appeared
 before the commissioner on behalf of the absent bankrupt, desiring
 to dispute the adjudication, as he might plainly have done if the
 bankrupt had not been absent. His authority to do this was dis-
 puted, — not a very usual thing to be done where a solicitor appears
 on behalf of a person whom he alleges to be a client. He appeared
 as the agent of other solicitors, also entitled to practise in the

(a) 19 Ves. 464.

(c) Mont. 12.

(b) 4 D. & C. 31.

(d) 2 Mont., Dea. & De G. 41.

Court of Bankruptcy. Their instructions were given by Mr. Edward Frampton, who acted as the guardian, and is the friend and uncle, of the alleged bankrupt, and who, moreover, acts under a general verbal or written authority (it does not matter which, for it may be oral as well as written) from the alleged bankrupt to act for him during his absence. If I had been the commissioner, I should have admitted Mr. Abbot to appear for Mr. Bubb, as the solicitor of Mr. Edward Frampton, and to act for the alleged bankrupt in disputing the adjudication; and I think that liberty should be given to him for that purpose.

THE LORD JUSTICE TURNER. — The words “such person,” in the 104th section of the Act, cannot be held to apply only to the bankrupt personally. The only question, therefore, is, whether there was authority in the uncle to act for the bankrupt? and I think there was. The order we make will therefore be: —

“It appearing to the Lords Justices that Mr. Edward Frampton is sufficiently authorized to act as agent of the petitioner, it is ordered that Mr. Edward Frampton be at liberty, on behalf of the petitioner, by such solicitor as he may think fit, to show cause against the * validity of the adjudication; and * 270 it is ordered that the inquiry as to the validity of the adjudication be proceeded with before the commissioner. Let the petition in all other respects stand over, with liberty to apply.”

Ex parte THOMAS NICHOLSON.

In the Matter of THOMAS NICHOLSON, a Bankrupt.

1859. August 2. Before the LORDS JUSTICES. November 5. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A bankrupt partner falsified the books of the firm, not with the view of any pecuniary advantage to himself, but in order to conceal from his partners a state of embarrassment in which the partnership affairs were involved, but which was conceived by him to be temporary only, he believing at the time that the concern would ultimately turn out a profitable one, but that his part-

ners, if they had known the true state of its affairs, would have abandoned it. *Held*, that his certificate had been properly refused, but, under the circumstances, the Court made an order for protection, so far as it might be available.

This Court has jurisdiction to grant protection to a bankrupt pending and before hearing his appeal from the total refusal of his certificate; and where the petition could not, in the ordinary course of business, be heard before the long vacation, and security was given for the bankrupt's restoration to the custody in which he was, at the suit of a judgment creditor, the Court granted protection, notwithstanding the opposition of the judgment creditor.

THIS was the appeal of the bankrupt from the refusal by the commissioner to grant him either certificate or protection.

The bankrupt, it appeared, had been engaged for several years, in partnership with two other persons, in the working of certain coal mines. This partnership was dissolved shortly before the adjudication, which was made against the bankrupt while trading on his own separate account, in August, 1858.

The granting of a certificate upon any terms was opposed before the commissioner by three creditors under the indemnity * 271 of the bankrupt's late partners, who * were themselves unable to appear in the character of creditors, the partnership accounts not having been yet made up.

Their opposition was founded mainly upon a charge against the bankrupt of having, while a member of the partnership firm, adopted a system of bookkeeping which did not truthfully record the transactions of the concern as they occurred, but involved a series of fictitious entries.

The commissioner adjudged that the bankrupt had, with a view to conceal the state of his affairs from his partners, and from the bankers of the firm, and also fraudulently to contract a debt to his partners, caused to be kept false books, and had thereby committed an offence against the law of bankruptcy within the meaning of the second and third divisions of the 256th section of the Bankrupt Law Consolidation Act, 1849; and on this ground (among others) entirely refused the bankrupt's application for a certificate of conformity. (a)

(a) The commissioner's judgment was as follows: The bankrupt was a partner in certain collieries situate near Lydvey, in the county of Gloucester, called the Park End and New Faney Collieries. In the year 1849, a change of the firm took place, and from this date his partners have been Mr. John Trotter and Messrs. T. and J. W. Sully. The interest was held in thirds, the Messrs.

* The bankrupt appealed from the refusal of the certificate, * 272 and filed affidavits in support of his petition of appeal.

Sully holding one-third, and a third belonging to each of the two other partners. The conduct of the concern was confided to the bankrupt, who had the general management of the business, and took charge of the accounts, Mr. Trotter superintending the works of the collieries and the supply of coals to the customers, each of these, the two active partners, receiving, in addition to his share of profits, a salary of 600*l.* per annum for his services. The undertakings were extensive, and the results on the whole have been fairly remunerative, yet, according to the allegations of the solvent partners, far less advantageous than they would have been had the bankrupt done his duty to the firm, as respects the accounts and the financial management; on the other hand, the bankrupt, whilst he admits that his system of bookkeeping cannot be justified, since it did not truthfully record the transactions of the concern as they occurred, but involved a series of fictitious entries, yet denies that any injury occurred to the firm by this departure from truth, but on the contrary alleges, that on the whole his bookkeeping was against his own interest, and has transferred many thousands of pounds to the firm which should have been passed to his individual credit, thereby mainly contributing to his failure. As regards the immediate grant of a certificate, the application was opposed by his trade assignees, who considered the bankrupt deserving of grave censure, for deliberately establishing a system of fallacious bookkeeping, a proceeding fraught with suspicion and dangerous consequences, either to his partners or to his creditors, or possibly to both, and they maintained that he had brought himself within the penal clauses of "The Bankrupt Law Consolidation Act, 1849," by "wilfully, and with intent to conceal the true state of his affairs, omitting to keep proper books of account," which offence, by the ninth branch of section 256, calls on the Court either to refuse the certificate altogether, or in any event to suspend it for a time. They further condemned his conduct in regard to his financial management; resorting, as he systematically did, to accommodation bills, for the purpose of raising funds. They also adopted, to a limited extent, the views of the other opponents to the certificate with regard to certain private transactions. But the conclusion, at which they state themselves to have arrived, not only after their own inquiries, but after the long investigation of the case in Court, is, that neither in regard to his conduct towards his partners, nor with regard to the private transactions to which I have adverted, can a charge of fraud be supported; they therefore submitted that the ends of justice would be attained without a refusal of the certificate altogether, if it should be suspended for such a period as the Court should think adequately measured the misconduct of the bankrupt. The Court always attaches great importance to the opinions of the trade assignees, chosen as they are by the creditors. In the present instance, the assignees have the advantage of an intimate knowledge of the bankrupt, gained from transactions of business with him, extending through a long space of time.

The partners, however, who appeared in the names, and by the authority of certain creditors, form a very different estimate of the bankrupt's deserts. They contended, first, that the bookkeeping had for its object to conceal the abstraction of moneys belonging to the firm, for the purpose of supplying the private

- * 273 * Affidavits having been filed in answer, and time being required to reply to them.

necessities of the bankrupt, and that this plan of concealment has enabled him thus to incur a debt to the concern, of an amount not yet perfectly ascertained, but which exceeds, by many thousand pounds, his interest in the partnership property, a course of dealing which they would have stopped at the outset, had not the accounts been so framed as to keep them in the dark. They also insist that his conduct with regard to his transactions in accommodation bills, which were commenced and carried on entirely without their own knowledge, was a gross breach of duty, and highly prejudicial to the character of the firm, and they further maintain, that his treatment of the parties in the private transactions referred to, was, if not amounting to a series of frauds, bringing him within the penal clauses of the Consolidation Act, yet dishonourable, and even dishonest to a degree meriting the severest animadversion, and they conclude by denying the bankrupt's claim to a certificate upon any terms. From this brief statement, it is obvious that the stress of the opposition fell on the partners. It is necessary, therefore, to enter at large into the case made on their behalf, together with the bankrupt's defence. It appears that the Messrs. Sully were sleeping partners, that Mr. Trotter directed the operations for winning the coal and delivering it into the barges or carriages, by which it was conveyed to the customers, that all disbursements for the construction and repair of works, and all payments of wages connected with the mines, were made through him, his accounts being from time to time consolidated with the general accounts of the firm, under the superintendence of the bankrupt, who had the assistance of a clerk, in addition to the aid furnished by Mr. Trotter, the wharfinger, and other subordinate servants, each keeping his particular account. No complaint is made by the bankrupt that the staff was in any way deficient, or that any impediment existed to accurately keeping a complete set of such books as are ordinarily to be found in a large concern, respectably conducted. An auditor, as he was called, came yearly to prepare a balance sheet. Mr. Houlson, the person referred to, was, when he first entered upon his duty, an assistant of Messrs. Fletcher, of Bristol, accountants. Mr. Houlson implicitly obeyed the directions of the bankrupt. It does not appear that he is open to much, if any, blame for so acting. The bankrupt was clearly the principal person in the concern, far superior in social position to Mr. Houlson. He was also at the head of the accounts, and it was never intimated to Mr. Houlson that he was appointed to guard the interests of the firm against the bankrupt, or that he filled any higher function than that of constructing a balance sheet which, perhaps, required somewhat more of skill and also of leisure than could be afforded by Mr. Wells, the permanent clerk. Mr. Houlson's proceedings were somewhat anomalous. He first made a trial balance sheet, as it is called,—that is to say, a balance sheet in the rough,—in which the various amounts might be by calculation made to check each other. So far so good; but, strange to say, Mr. Houlson always framed the first draft of his trial balance sheet before the books were finally closed. The consequence was, that the bankrupt having had an opportunity of seeing how the result would stand without further change in the books themselves, inasmuch as he had the figures of the trial balance sheet before him, was in the habit of directing fresh

Mr. Glasse and Mr. De Gez applied on this day * that, * 274
as the petition could not now be heard before the long vaca-

entries, and these being made, a final balance sheet was drawn up and copied into the books. A summary was then sent to each partner, which appears to have satisfied all of them without any examination of the books, or without even comparing their summary with the full balance sheet; and thus the firm went on until the month of May in the last year. Up to the year 1845, a cash-book had been kept as one of the partnership books, but it was then discontinued. The Court has almost daily opportunities of observing the evils which flow from the want of an accurate record of all cash transactions entered as they occur.

Before bankruptcy its absence keeps the trader in ignorance of the daily working of his concern; an ignorance to which his ultimate failure may be not seldom traced, while after bankruptcy it so obstructs the official assignee and the accountant in acquiring a complete knowledge of his affairs that I have sometimes inclined to the opinion, that in no concern of any magnitude can a bankrupt who has not kept a cash-book give to his creditors that full and precise information as to his financial position which the law contemplates as a condition precedent to his relief by certificate from his debts. The customers of the collieries worked by the bankrupt and his partners amounted to 500 in number, and their accounts were complicated by abatements and allowances of various kinds. The discontinuance, therefore, of a regular cash-book is of itself a great offence, and the cause of merited suspicion; that the bankrupt kept private books for his own information he admits; these, however, are not forthcoming. Whether their absence is the fault of the bankrupt or whether it results from their accidental loss rests in doubt, the bankrupt stating that he left them at the office of the partnership, but they were not among the stated books of the concern, and seem to have been used for the purpose of enabling the bankrupt to dictate from time to time cash entries to Wells in the journal, the ledger, and a book called the account current. It is admitted by the bankrupt, however, that such entries were sometimes mere estimates or rather guesses, and it is quite clear that either the bankrupt did not possess the requisite documents to enable him to dictate accurately, or that he did not choose to abide by the facts as they really stood. The omissions in the course of years were manifold. This is proved by the account current, in which we frequently find numerous and consecutive omissions of entries to the credit of customers to an extent which makes it utterly useless as regards a record of receipts, although perhaps a collation of this book with others might, in the hands of a skilful accountant, do much towards filling up the blanks. Another important book in a complete set of merchant's accounts is the bill-book; and here again, when a large portion of the legitimate payments to the firm were made in bills, and when the firm was in the habit of drawing bills, and when again money was raised by the bankrupt on the partnership responsibility by means of accommodation bills, so that what with their liabilities as drawers, acceptors, or indorsees, the firm had of late years generally bills of exchange and notes outstanding to the amount of 5000*l.*, the concern was left entirely destitute of this all-important register. To every person familiar with bookkeeping it will be evident that by omitting to keep a cash-book and a bill-book, the bankrupt must have plunged himself into a sea of troubles, and must

tion, protection might be granted to the bankrupt in the * 275 mean time. They referred to the dates of the * filing of

have seriously augmented his labour and anxiety; indeed, we find that when the firm had to provide for accommodation bills, he often had to send out to make inquiries as to the exact date at which they would arrive at maturity; and when it is admitted that he is an excellent accountant, it is difficult indeed to imagine a reason consistent with rectitude, which could have induced him to impair his own means of executing the trust confided to him by his partners. It is quite true that many of the entries are unjustly to his own prejudice; he seems to have been in the habit of debiting himself with the gross amount of the invoices to customers, although he had made at the time of receipt the abatements and allowances to which reference has been made. These improper debits against himself he appears to have rectified or purported to rectify from time to time by dictating entries to his credit of lumping sums, a mode of proceeding which, even if its good faith were unimpeachable, would be deserving of severe censure as gratuitously embrangling the accounts and exposing them to fall into almost certain confusion and inaccuracy. Thus the books contain entries, some of which, if they have any distinct bearing one way or other, let it be stated, are against the interest of the bankrupt, who, however, proffers no intelligible reason for this part of his proceedings, and who, assuming him to be sincere in his answers, must have lost the clew to the labyrinth in which he has involved himself.

On the whole matter, then, I cannot resist the conclusion that the view taken by the partners is substantially right, and I adjudge that the bankrupt has, with intent to conceal the state of his affairs from his partners and from the bankers of the firm, and also fraudulently to contract a debt with his partners, caused to be kept false books, and has thereby committed an offence against the law of bankruptcy within the meaning of the second and third branches of the section above referred to. I further adjudge that he has committed the offences charged against him by the trade assignees; I also find that he has been guilty of gross misconduct in the general management of his trade; and again, I find that he has systematically dealt in accommodation bills; and finally, that he has effected loans and obtained a forbearance of loans in a manner both dishonourable and dishonest. The inevitable consequence of these accumulated adverse findings and adjudications is, that the bankrupt's application for a certificate of conformity must be entirely refused. One question still remains for decision, — Shall the bankrupt be sheltered from imprisonment at the suit of his creditors if they should be disposed to acts of hostility towards him? He is a person far advanced in life, — a plea in his favour which even standing alone has been in this Court considered a sufficient claim for its protection. In the present case other grounds may be fairly stated: until last year the bankrupt enjoyed, and during the greater part of his long life, I hope and trust — and I will go on to say I believe — he deserved a very enviable position in society; he was appointed official manager in winding up the Monmouthshire and Glamorganshire Bank, an office of high confidence, which would not have been conferred upon any person who had not established a most honourable character. The judgment which it has been my painful duty to pronounce is, to such a man, a fearful calamity, and

the affidavits, and contended that the delay in the hearing of the appeal was not occasioned by any want of diligence on the part of the appellant.

* *Mr. Bagley*, for an opposing creditor, and *Mr. H. Stevens*, * 276 for the assignees, did not oppose the application.

* *Mr. Jessel*, for a creditor at whose suit the bankrupt * 277 was in custody, in opposition to the application. — The Court has no jurisdiction, while the certificate remains refused, to take the bankrupt out of custody as against a detaining creditor, or without his consent. Until the refusal has been reversed it is in force, and the Act expressly provides that, in such a case, there shall be no protection. The detaining creditor is not a party to the appeal, not having opposed the application for a certificate. How, then, can he be affected by the question of delay as between the appellant or respondents? He has a statutory right to enforce his legal remedies against a bankrupt whose certificate has been refused; and until that refusal has been actually reversed on the merits, his right cannot be disturbed without his consent.

In answer to a question from the Court, the counsel * for * 278 the appellant said that his friends would deposit in Court a sufficient sum to cover the demand of the detaining creditor as a security for the appellant's surrendering himself again to custody if so required.

THE LORD JUSTICE KNIGHT BRUCE. — I entertain no doubt of the jurisdiction of the Court to grant protection by reason of the

nothing short of the most irresistible obligation would induce the Court to add to the bitterness of his affliction, — that obligation does not in my judgment exist in the present case. The bankrupt will therefore receive a protection, not limited in time, but which may be revoked on cause being shown to the Court against its continuance.

On a subsequent day the commissioner said: "On referring again to the Bankrupt Law Consolidation Act, I find that the protection awarded to the bankrupt will be inoperative in law, as being prohibited whenever a bankrupt, as in the present case, is adjudged to have committed an offence enumerated in section 256. I hope, however, that the expression of the opinion of the Court will not have been wholly without effect. Still it is right that it should be known that if, as I earnestly hope, the bankrupt will not be molested, he will owe this immunity to the forbearance of his creditors, and not to legal protection."

pendency of the appeal. The Court has exercised such a jurisdiction as long as I can recollect. The question is, whether the circumstances of this case render the exercise of such a jurisdiction proper; and if so, on what terms? The progress of the argument has removed doubts which I at first had upon two points; I doubted whether the bankrupt was not in default for not proceeding with his petition effectually before the long vacation; I also doubted whether the Court, without hearing the case, could interfere by granting protection unless on the terms of satisfying the detaining creditor, or with his consent. On the former of these points I am of opinion now, that if all the materials were here ready for the hearing of this appeal, and the bankrupt had been fully prepared to go on with the case, it could not have been concluded before the long vacation. I think, therefore, that the postponement does not arise from any default on his part. In such a state of things, the Court not being able to proceed with the case before the long vacation, it would be harsh not to interfere by granting protection if the Court has the power to do so. I am not sure that the Court might not properly grant protection unconditionally, but I certainly think that the Court ought to grant it on the offer now made on the part of the bankrupt's friends to deposit the full amount of the debt as a security for the bankrupt's again rendering himself. I think that if the creditor has full security for the bankrupt's return to custody all the * purposes of justice will be answered. Let such sum be deposited as will be sufficient to cover the debt and costs, to be applied in payment of the debt and costs if the bankrupt shall not return to custody, or the Court shall think fit. On that deposit being made, we will grant protection.

THE LORD JUSTICE TURNER. — This case stands in a peculiar position. The commissioner has decided against the bankrupt, who has a right to have the decision reviewed. But the Court is not now in a position to review the decision. If the appeal were part heard, it would, I apprehend, be of course to give protection, unless the Court thought the case clear against the bankrupt. It is said that we must, for the purpose of this argument, take the commissioner's decision to be correct. But to do this would be to ignore the appeal. The question seems to be, to which of the parties will the greater prejudice arise by deciding this point

against him ; whether the opposing creditor will suffer more injury by protection being granted, or the bankrupt from its being refused. There seems to me no comparison between the two. If, therefore, by payment of the money into Court sufficient security is given for the return of the debtor to prison if protection shall be refused, I think protection ought to be given.

The required deposit was made and protection was granted.

November 5.

The petition now came to be heard before the full Court.

Mr. Glasse and *Mr. De Gez*, for the appellant. — * It can- * 280 not be denied that the bankrupt did make fictitious entries in the books of the partnership. These, however, were not numerous, nor were they made with any dishonest motive or any view to the bankrupt's own advantage. They were, indeed, to his own prejudice, and consisted of items debiting him with the gross amounts of invoices to customers, although he had not received those amounts, but had made at the time of receipt the abatements and allowances usual in the trade. Upon the whole no injury was caused to the firm by this departure from truth ; but, on the contrary, his bookkeeping resulted in the transfer of considerable sums to the firm which should have been passed to his own credit. His object was to give as flourishing an appearance as possible to the partnership business, and to conceal from his partners the state of embarrassment, which he conceived to be temporary only, in which it was then involved. This is not a concealment within the penalty of the Act. For this purpose "a concealment from the creditors of the concern, so as to obtain fictitious credit," must be shown.

Under these circumstances we submit that the commissioner's sentence is too severe ; and that, as the bankrupt's conduct, though culpable, has not been fraudulent, this Court will grant him a certificate of a lower class, with suspension for such a period as may be deemed right. If, however, the Court should agree with the commissioner in the total refusal of a certificate, then we ask that at any rate protection from arrest may be granted to the bankrupt. The commissioner in his judgment, and all the creditors, including those who represented the partners before the commissioner,

desired that this indulgence should, if possible, be extended to him; and the commissioner only refused it because he conceived it beyond his power to grant it.

* 281 [THE LORD * CHANCELLOR. — Have we power to grant protection where we refuse a certificate?]

It has been sometimes done.

In *Ex parte Rufford*, (a) *Ex parte Hollhouse*, (b) *Ex parte Manico*, (c) *Ex parte Sturt*, (d) protection was granted with the consent of the assignees; and, as the consent could not give the Court jurisdiction, the Court must equally have power to make the order without consent. In the present case, although the assignees do not actually consent, they do not oppose, and all the creditors desire that protection should be granted, except the one creditor who now opposes. That creditor is the solicitor of the bankrupt's late partners, who are still unable to appear themselves in the character of creditors. Their solicitor, however, being a judgment creditor upon a bill of exchange, represents them, and still continues the opposition on their behalf.

Mr. Bagley, for the opposing creditor. — The bookkeeping complained of is not admitted by the bankrupt's late partners to have been practised with merely the motives assigned. On the contrary, they insist that it had for its object to conceal the abstraction of moneys belonging to the firm, for the purpose of supplying the private necessities of the bankrupt, and that this plan of concealment has enabled him to incur a debt to the concern to an amount not yet ascertained, but which exceeds by many thousand pounds his interest in the partnership property, — a course of dealing which they would have stopped at the outset, had not the accounts been so framed as to keep them in the dark. They also insist that the bankrupt, while a member of the firm and acting

* 282 as managing partner in it, resorted * systematically to accommodation bills for the purpose of raising funds; and that his conduct in his transactions in such accommodation bills, which were commenced and carried on entirely without the knowledge of his partners, was a gross breach of duty and highly preju-

(a) 2 De G., M. & G. 234.

(c) 3 De G., M. & G. 502.

(b) 1 De G., M. & G. 237.

(d) 4 De G. & Sm. 49.

dicial to the character of the firm. It is also insisted that his conduct in certain private transactions, if not amounting to fraud, bringing him within the penal clauses of the Consolidation Act, was yet deserving of the severest animadversion. As an instance of this misconduct, there is evidence to show that he has obtained an advance of 600*l.* from Birks (one of the scheduled creditors) upon the deposit of securities alleged by him to be substantial, they being in fact merely nominal; and in another instance he is proved to have given by way of security for advances from his bankers a mortgage of real estate called the Douro Villa, of the whole of which he represented himself as owner, the fact being that, though legally seized of the whole, he was entitled to the beneficial interest in one-third only. As to the grant of protection, it is submitted that this has never been granted in any case where there has been a total refusal of certificate, and there is opposition on the part of any of the creditors.

THE LORD CHANCELLOR. — Do the assignees refuse to consent to the grant of protection *valeat quantum* to the bankrupt, if the Court shall come to the conclusion that he ought not to have his certificate?]

Mr. H. Stevens, for the assignees, said that they offered no opposition to protection being granted, but that he was not instructed to say they consented.

Mr. Glasse, in reply. — It is not denied that the bankrupt's conduct in falsifying * the partnership books is inde- * 283 fensible. It admits, however, of some palliation from the circumstance that the motive was not fraudulent, and the result not to the profit of the bankrupt himself. As to the other instances of misconduct, they are denied, and there is evidence to disprove them. Upon the whole, therefore, it is submitted that a sentence somewhat less severe than that pronounced by the learned commissioner would satisfy the demands both of justice and of the interests of the commercial world.

THE LORD CHANCELLOR. — I am of opinion that the sentence appealed from, so far as it refuses the certificate, should not be disturbed. The commissioner felt pain in passing the sentence.

I feel great pain in being obliged to affirm it so far. I think the reasonable result of the evidence is, that the bankrupt has been guilty of falsifying the partnership books, and of making false entries with intent to conceal the true state of the partnership affairs from his partners. He says, by way of defence, that he believed they would not ultimately suffer by it, and that in the result it would turn out for the benefit of the concern. That is clearly no justification, and is but a very slender palliation. I recollect that in the British Bank case it was shown to have been a frequent practice in the commercial world to keep accounts known to be false, in the belief that it was for the benefit of the particular concern, and that the concern would not ultimately suffer by the false entries being made. I think such a practice most reprehensible, and that it would be attended with the worst consequences if I held the bankrupt entitled to his certificate in this case. I am of opinion, therefore, that the commissioner's judgment, so far as it refuses the certificate should be affirmed.

* 284 * At the same time, having regard to all the circumstances of the case, seeing that all the creditors, except the bankrupt's late partners, authorize the statement that they are pained at the condition into which the bankrupt has fallen, and that they are willing that some mitigation should, if possible, be made in the severity of the sentence pronounced upon him, seeing also that the commissioner has himself expressed the same desire, I should be willing, if the Court has the power, to protect his person from arrest for debts hitherto contracted, his future-acquired property remaining liable, as he has no certificate. It appears that on several occasions this Court has made an order for protection, where the certificate has been refused. Without giving any opinion upon the legal validity of such an order, I must say I think it desirable that the Court should have the power of granting protection to an uncertificated bankrupt from arrest. Without, therefore, expressing any opinion as to whether the law as it stands does or not confer authority upon the Court to give effectual protection in such a case, I think there is enough in the circumstances of the case before us to warrant the variation of the learned commissioner's judgment, by an order granting protection to the bankrupt against arrest *valeat quantum*.

THE LORD JUSTICE KNIGHT BRUCE. — My conclusion is the same. I think that the interests of society require that bankrupts who have kept false books, though under circumstances of palliation, should be severely dealt with. I regret to say that, had the dealing with the books been out of the case, the transaction with Birks and the transaction with respect to the villa appear to be of such a nature as probably of themselves to be fatal to the claim of a certificate. In the circumstances of this case, however, I have no objection * to grant protection, subject to every chance * 285 of its proving ineffectual. The bankrupt may take such benefit from it as he can.

With respect to the costs, it seems to me that the deposit should be divided amongst the respondents, and that they should take the rest of their costs out of the estate.

THE LORD JUSTICE TURNER. — I agree that in this case we must refuse the certificate. I think that, beyond all doubt, we are bound on public grounds to do so. Upon the question of protection, my conclusion must depend very much upon the wishes of the commissioner and upon the wishes of the creditors. Looking at those wishes, I think that we ought not to refuse protection if we have power to grant it. As to its validity or invalidity, if questioned by any creditor in a Court of Law, I give no opinion. That is a question open to some doubt. I agree that the commissioner's judgment should be varied by an order for protection *valeat quantum*.

* *Ex parte* JOHN DANCE. * 286

In the Matter of JOHN DANCE and HENRY WANE,
Bankrupts.

1859. December 16. Before the LORDS JUSTICES.

One of two partners, who were agents to a banking company, made false returns to them of the notes in the agents' possession, but without the knowledge of the other partner. On the partners becoming bankrupt: *Held*, that the last-mentioned partner ought to have seen to the accuracy of the returns, and had been guilty of negligence, imprudence, and over-confidence, but that it was not a case for the total refusal of his certificate.

THIS was an appeal from the decision of Mr. Commissioner HILL, totally refusing the appellant's certificate. The bankrupts had carried on business as general dealers at Fairford in Gloucestershire, and had acted as the agents there of the Gloucestershire Banking Company.

The bankrupt Wane had had the management of the agency business; the appellant having carried on separately a distinct business from that carried on by the two.

It appeared upon the evidence that false returns had been made to the company as to the notes of the bank in the possession of the bankrupts, but it did not appear that the appellant had taken any part in making the returns, or had been aware of their contents. He stated that he had relied entirely upon his partner.

The commissioner having refused to grant any certificate to either of the bankrupts, the bankrupt Dance appealed.

Mr. T. H. Terrell and *Mr. Stiffe* supported the appeal. — The assignees had been served with the petition to appeal, but did not appear.

* 287 * THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that the evidence does not bring the case of the petitioner within any part of the 256th section of the Bankrupt Act. Still he may not be entitled to a certificate. The question is, whether, independently of the 256th section, a case of dishonesty of any kind has been established against the petitioner, and on the whole of the evidence I am of opinion that dishonest intention has not been established against him. That he has, however, been negligent, imprudent and over-confiding, where, as between himself and the bank, he ought not to have confided at all, is clear; and if any excuse can be found for this remissness it must be sought in the infirm state of health in which, I think, he is proved to have been. This may possibly furnish to some extent an excuse for the neglect and imprudence which are the subject of complaint. But a man has no right to be negligent and imprudent in business of this nature. And negligence and imprudence must, I think, be noticed upon the question of granting a certificate. But for the circumstance that the appellant has been bankrupt from 1857 down to the close of 1859, during which period he has, as I find, at the instance of a creditor, been imprisoned for more than five months,

I should probably not have thought it right to grant him an immediate certificate. The result, however, of all the considerations to which I have referred is, that a second-class certificate may, in my judgment, be now accorded to him. This, as I have said, I certainly should not have been prepared to grant but for the date of the bankruptcy, the subsequent imprisonment of the bankrupt, and the state of ill-health in which he was at an important period.

* THE LORD JUSTICE TURNER. — I think, as the fair result * 288 of the evidence, that it is established that false returns were made to the bank of the amount of notes remaining in hand, and were so made with the knowledge of one of the bankrupts.

But in order to bring the case within sect. 256 of the Bankrupt Law Consolidation Act, it is necessary to show not merely that false returns were made, but that they were made with intent to conceal the state of the bankrupt's affairs, or to defeat the object of the law of bankruptcy. On the best consideration which I have been able to give to the evidence in this case, it seems to fail in establishing the fact of any such intent. I think, therefore, that the case is not within the 256th section; but at the same time I think that there has been conduct on the part of the appellant himself of which the Court cannot approve. He appears to me, however, to have been already sufficiently punished, and I agree therefore with my learned brother in thinking that there should be an immediate certificate of the second class.

* *Ex parte* URLAH ALSOP.

* 289

In the Matter of RICHARD REES, an alleged Bankrupt.

1859. December 17. Before the LORDS JUSTICES.

The execution by a trader of a deed of assignment of all his estate and effects for the benefit of his creditors, although purporting to be made under the arrangement clauses of the Bankrupt Law Consolidation Act, is an act of bankruptcy of which any creditor who has not executed or acceded to the deed may, prior to its execution by the required majority of six-sevenths in number and value of the creditors, avail himself in support of his petition for adjudication of bankruptcy against the trader. But where a creditor had

advised the trader respecting a sale under such a deed, — *Held*, that the creditor had acquiesced in it so as to be precluded from treating it as an act of bankruptcy.¹

THIS was an appeal of the petitioning creditor against the decision of Mr. Commissioner HILL, annulling an adjudication as having been founded upon an insufficient act of bankruptcy.

The alleged bankrupt, a cabinet-maker of Llanelly, in Caermarthenshire, on the 2d of November, 1859, executed an assignment of all his estate and effects to a trustee, upon trust for sale and for the distribution of the proceeds amongst his creditors; the deed purporting to be made in pursuance of the provisions of "The Bankrupt Law Consolidation Act, 1849," relating to arrangements by deed, and to be intended by all the persons by or on whose behalf it was or should be signed, or executed, to operate, so far as might be, as a deed of arrangement, to be made obligatory under the provisions of the Act.

Immediately upon the execution of the deed the trustee took possession of the property, and prepared particulars and conditions, with the view of proceeding forthwith to a sale.

* 290 On the 11th of November, however, the petitioning * creditor petitioned for an adjudication of bankruptcy against the alleged bankrupt, relying upon the execution of the deed as an act of bankruptcy; that document not having yet been signed by or on behalf of six-sevenths in number and value of the creditors. On the same day, the adjudication was made; but on cause being afterwards shown, the commissioner held that neither the execution of the deed of assignment by the alleged bankrupt, nor any thing which had occurred subsequently in respect of the arrangement, amounted to an act of bankruptcy, and pronounced the order under appeal. (a)

(a) The commissioner's reasons were stated in his judgment, and were as follows: —

"The question for the decision of the Court is, whether or not a deed of assignment, which the alleged bankrupt has made to certain trustees is an act of bankruptcy, or whether any thing which has occurred since in respect of the arrangement which was incepted by the deed, when taken in connection therewith, amounts to an act of bankruptcy. Now, first as regards the deed; the legislature has thrown upon the Courts of Bankruptcy a very delicate but a most important duty, namely, to see that assignments are not made and carried into execution which would defeat the rights of all the creditors except those who

¹ See *Ex parte Stray, In re Stray*, L. R. 2 Ch. Ap. 374, 377.

* In opposition to the appeal, affidavits were filed on behalf * 291
of the alleged bankrupt, from which it appeared * that the * 292

chose to sign such deeds, not by depriving them of their dividend, but by depriving them of the means which this Court gives them of adding to the estate, frequently to a most important extent, and which, according to the old law, can only be done when the estate is wound up in bankruptcy. Thus, for instance, suppose there has been a fraudulent preference in contemplation of bankruptcy, such fraudulent preference cannot be set aside except through the medium of a bankruptcy, because, although for brevity we say that a preference is fraudulent and bad, if made in contemplation of bankruptcy, yet such contemplation to be available to the creditors must be followed by an adjudication. It is therefore very material indeed where parties desire to settle their own affairs; that is, where certain creditors desire to settle with the debtor, that they should be held to strict responsibility as to the mode in which such settlement is to be effected. Indeed, until of late years, any attempt to settle the affairs of an insolvent trader without the consent of all his creditors, could be set aside by any one of those creditors, because the attempt itself being an act of bankruptcy, the dissentient creditor was furnished with his remedy by the act of those who desired to settle out of Court. He came into Court, and then all that had been done out of Court went for nothing, and so the matter ended in bankruptcy. Perhaps I ought to qualify this by adding, that where the attempt of a portion of the creditors to settle amongst themselves fails, one of the necessary conditions to a bankruptcy was furnished by themselves, namely, the act of bankruptcy. But, on the other hand, there was found to exist on the part of the commercial world a very strong desire to be able to settle conclusively the affairs of a failing trader, without going into bankruptcy at all, and the legislature yielding to that very natural and reasonable desire has said, 'It is too much to permit one creditor, and possibly one to a small amount, to defeat an arrangement which may be for the benefit of all parties, and therefore we will concede this power, that when six-sevenths of the creditors in number and value agree upon a settlement out of Court, if they take the steps provided for the purpose, they may set at defiance the dissentient or any number of dissentient creditors who do not amount to one-seventh of the whole body in number and value.' This power having been granted by the legislature, it now becomes the duty of the Court to see that such a privilege is not rendered nugatory by a sweeping application of the old powers in bankruptcy which have grown up, partly by the Act of the legislature and partly by the earlier decisions of the Courts before the passing of the late Act whereby that privilege was conferred. It appears to me, therefore, that such arrangements must be well considered before the Court can arrive at the conclusion, that the power of treating an arrangement of this kind whilst in inception as an act of bankruptcy exists. It seems to me that such an application is repugnant to, and even destructive of, the privilege which the legislature has granted. If it can be said that the moment a deed, which the parties intend as a deed of arrangement, is executed, an act of bankruptcy is committed, it will operate as the greatest possible discouragement to such deeds, and seems to me to be in direct opposition to the general intention of the legislature. On the other hand, care must be taken that, under the guise of a deed which is to be

petitioning creditor had expressed an opinion in favour of the
* 293 sale proceeding under the assignment, * and recommended

carried into operation by means of these sections of the Consolidation Act which regard arrangements by deed, and which give to the Court a control over them, it is not in the nature of an ordinary deed, but that it is a deed operating, it is true, in the first instance only upon those who execute it, but yet by lapse of time gaining an operation which is conclusive upon all, and whereby the dissentient creditors may be thrown off their guard by the belief that the deed is being worked under the arrangement clauses of the Consolidation Act. And therefore it did appear to me to be very important to ascertain what was done under this deed. Now, it seems that what was done under this deed was, that the trustees took possession of the property, and were proceeding to a sale when the adjudication took place. The first question then is, whether there has been any unreasonable delay in the carrying of this deed into execution, so that it can be said that there has been laches or negligence in not obtaining the assent of six-sevenths of the creditors to the extent of making it reasonable to suppose that the parties to the deed never had the power to obtain the assent of such six-sevenths, or that they have lost that power by their own supineness. I do not apprehend, and indeed it is not alleged, that there has been any such unreasonable delay; indeed, the dates show that the time that elapsed between the execution of the deed and the adjudication, is clearly not unreasonable. Then with regard to the seizure or taking possession of the property by the trustees, if any portion of their conduct went to show that they were taking possession with a view of acting upon the deed, even though the assent of six-sevenths could not be obtained, that might be an important question to consider, especially if the alleged bankrupt had assented to any such conduct. But there is no allegation of any such conduct on the part of the trustees, nor is it even hinted that they were acting otherwise than *bond fide*. The question then is, was the taking possession by the trustees under the circumstances right and proper? I confess that at first I was inclined to think the trustees ought not so to have acted until six-sevenths of the creditors had concurred in the deed; but when I remember how important it is in these matters that the property should come into the hands of those who have no motive for dissipating it, but, on the contrary, every motive of interest and duty to take the greatest possible care of it for the benefit of the creditors, I think it would be too much to say that the taking possession did of itself manifest an intention that the deed was not *bond fide* to be carried into effect under the arrangement clauses of the Act for the benefit of all parties; and here the section giving the creditors power to come to the Court seems to have a very important bearing. And first, I may state, that I do not see any thing in the Act to justify the conclusion that the legislature intended to limit the commencement of the operation of the 224th section to any particular time, or that this section and the powers given by it do not operate from the first, but at some future stage of the proceedings. If a creditor, the very moment the trader has executed a deed of this nature, and the trustees have accepted the trust, were to come to the Court to make a complaint, it does not seem to me that the Court would have jurisdiction to entertain it; and I should meet any supposed difficulty on the question of jurisdiction in this way,

that it should be on a market day, and had said that he should come down and attend it; and that he had written a letter dated the 8th of November, 1859, to the trustee, in which he asked that * particulars of the intended sale at Llanelly * 294 might be sent to him, to give him a chance of attending it. In another letter, dated the 9th of November, 1859, he gave the bankrupt advice as to some particulars of the sale of his property, and told him the names of two of the creditors who had executed the deed, but added, "I, however, have not done so."

Mr. Selwyn and *Mr. Bagley*, in support of the appeal. — The execution of the deed of assignment by the bankrupt would, before the passing of "The Bankrupt Law Consolidation Act," 12 & 13 Vict. c. 106, have clearly been an act of bankruptcy, — and there is nothing in the Arrangement Clauses (a) of that Act

I should say, 'Take out a summons and bring the deed into Court.' Of course, to give a jurisdiction, the fact must exist, and to give an operative jurisdiction the evidence of the fact must be adduced; but it seems to me that the jurisdiction comes into existence when the fact comes into existence. Well, then, the question I am now considering is this, was an act of bankruptcy committed by the execution of this deed? I am of opinion that there was not. The next question is, was an act of bankruptcy committed by the seizure of the property? It is quite clear that the seizure of the property is only one step towards an act of bankruptcy, because the seizure is not made by the bankrupt, and he is no party to it. But it is said that he afterwards assented to the seizure. For my own part I cannot say that the letters upon which this charge is founded prove that he did so. If any act had been brought to the knowledge of the Court, showing that the alleged bankrupt knew the trustees had taken possession, those matters might be important as showing the state of his mind at the time, and that he did assent. I do not, however, believe that this point is of the importance I attached to it in my own mind during the argument, and for this reason, that if it were right in a winding-up order under the arrangement clauses for the trustees to take possession, then it was not wrong for the bankrupt to assent to it. Upon the best consideration which I can give to the matter, I think it immaterial whether the bankrupt assented or not. I do not see that any thing has been done here by any party inconsistent with *bona fides* in carrying out the settlement of this trader's affairs through the arrangement clauses of the Bankruptcy Act, and therefore I am of opinion that neither this deed nor any thing brought before the Court as having been done under this deed can amount to an act of bankruptcy. The question is one of very great importance and of no slight difficulty, and I should be very glad indeed to have the guidance of the Appellate Court upon it."

(a) The following clauses were read and commented upon: —

Sect. 68. That if any such trader shall execute any conveyance or assignment

* 295 which prevents the * execution of such a deed from operating as an act of bankruptcy in the interval, between the execution of the deed and the fulfilment of the conditions required

by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader, and by every such trustee, be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers, and in case such trader does not reside within forty miles of London, then in the London Gazette and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor.

Sect. 224. That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy; provided always, that every creditor shall be accounted a creditor in value in respect of such amount only, as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him.

Sect. 225. That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby.

by sections 224 and 225. The alleged assent to the deed by the petitioning creditor he expressly denies. The *onus* of proof rests upon the bankrupt, and the evidence adduced by him has, it is submitted, failed to establish it.

Mr. Bacon and *Mr. Southgate*, in support of the order.

— * The deed of assignment in question was not executed * 296 in any way to defeat or delay creditors, but for the express purpose of carrying into effect the provisions of the Consolidation Act, — provisions which are for the benefit of the creditors as well as for that of the trader. Until execution by six-sevenths in number and value of the creditors, the deed is simply inoperative. It is doubtful whether, until then, it has the effect of passing the legal estate to the trustee; but if it has, there is a resulting trust in favour of the creditors, whose rights are not till then affected. The object of the deed is to effect a distribution of the property in a manner, not at variance with, but in fulfilment of, the provisions of the statute; and to hold, that by executing it the bankrupt committed an act of bankruptcy, would be to neutralize the whole scope and spirit of those provisions.

They referred to *Dutton v. Morrison*, (a) *Young v. Waud*, (b) *Ex parte Wilkes*, (c) *Ex parte Calvert*. (d)

Mr. Selwyn, in reply.

THE LORD JUSTICE TURNER. — There are two questions raised in the present case; one whether an act of bankruptcy has been committed; the other, whether Mr. Alsop, the petitioning creditor, had so far assented to the deed of arrangement as to have precluded himself from proceeding upon it as an act of bankruptcy on which to found a petition for an adjudication of bankruptcy. Upon the first point I am of opinion that there has been here an act of bankruptcy. Before the passing of the Bankrupt Law Consolidation * Act, the execution by a trader of a deed pur- * 297 porting to be a general assignment of all his property to trustees, for the benefit of his creditors, was an act of bankruptcy. The Court has, therefore, to consider what is the effect of that

(a) 17 Ves. 193.

(c) 5 De G., M. & G. 418.

(b) 8 Exch. 221.

(d) 3 De G. & J. 95.

statute. The 68th section only saves the execution of such a deed in such manner as the Act requires from operating as an act of bankruptcy after the expiration of three months. Then, turning to the 224th and 225th sections, we are to see whether any thing in those sections has prevented the execution of such a deed from operating as an act of bankruptcy, bearing in mind that, where the legislature meant that it should not operate as an act of bankruptcy, it has expressly so declared in section 68. It cannot be said that either of the sections, 224 and 225, contains any express provision that the execution of such a deed shall not be an act of bankruptcy; so that, if under those sections the execution of such a deed is not to be considered as an act of bankruptcy, it is by inference only that it is not to be so considered. Now, the 224th section is to the effect only, that every deed of arrangement shall be as effectual and obligatory in all respects upon the creditors, who shall not have signed such deed, as if they had duly signed the same in cases where the deed has been signed by or on behalf of six-sevenths of the creditors in number and value; not, therefore, that the deed should be at once obligatory on all the creditors, but that it should be obligatory on them only when so executed and signed.

It was said that a more extended operation should be given to the 224th section; but that observation is answered by the 225th section, which enacts [His Lordship read the section, (a)].

— It is, I think, the intention of the legislature, expressed * 298 in that section, that such a * deed is not to affect the rights of creditors unless three months have expired, or unless a certificate is obtained from the Court that six-sevenths of the creditors in number and value have executed it. The effect of holding such a deed to be valid *ab initio*, would be to make it binding without the very certificate which constitutes the condition on which it is to be binding.

It was said that the effect of so deciding would be entirely to defeat all such deeds. That seems, however, not to be a necessary consequence, because the debtor has only to procure the execution of the deed by the requisite majority of the creditors, and, having procured that execution, to obtain the certificate, which the legislature has provided as the condition on which the deed is to be valid.

(a) See *ante*, p. 295, note.

I think, therefore, that the only true construction of the Act of Parliament is, that the execution of this deed was an act of bankruptcy. The only remaining question is, whether the petitioning creditor has so far assented to this deed as to have lost the right of availing himself of it as an act of bankruptcy. Upon the result of the evidence, I have come to the conclusion that the petitioner must be considered as having so far assented to the deed as to have precluded himself, notwithstanding his refusal to sign it, from disputing it. I am wholly unable to account for his letter of the 8th of November to the trustee, upon the assumption that at that time he was not an assenting party to the deed as a deed to be executed by the requisite number of creditors. Upon the ground, therefore, that the petitioner must be considered as having deprived himself of the right to rely upon the act of bankruptcy which has been committed, I think the commissioner's order must stand.

* THE LORD JUSTICE KNIGHT BRUCE. — I also am of * 299 opinion that the execution of this deed was and is an act of bankruptcy, of which the petitioning creditor was and is entitled to avail himself, unless he has precluded himself by assent, submission, or acquiescence. The Lord Justice has expressed an opinion that he has so precluded himself. Upon this point I must confess that I am not quite satisfied; but my learned brother's opinion being in favour of the commissioner's order, of course that order must stand. We are both of opinion that each party to this contest should have his costs out of the estate, and that the deposit should be returned.

Ex parte ISAAC THOMAS PERRINS.

In the Matter of ISAAC THOMAS PERRINS.

1859. January 21. Before the LORDS JUSTICES.

In the accounts of an arranging debtor, his stock in trade was valued at 472*l.*, his good credits at 499*l.*, the doubtful at 276*l.*, and the bad at 1808*l.* His debts were 3900*l.* There were uncontradicted affidavits that, if the estate were realized under a bankruptcy, a dividend of 2*s.* in the pound, only, would be paid. A proposal for immediate payment of a dividend of 2*s.* 6*d.* in the pound, and for the delivery of the debtor's own promissory notes for 2*s.* 6*d.* more on a future day, had been assented to by three-fifths of the creditors: *Held*, that there was not sufficient ground for disturbing the decision of the commissioner, who declined to confirm the proposal as being not reasonable, and adjudicated the debtor a bankrupt.

THIS was an appeal from the decision of Mr, Commissioner SANDERS, refusing to confirm an arrangement proposed to be made under the control of the Court, and adjudicating the appellant bankrupt.

On the 27th of September, 1859, the appellant filed his petition for protection to the Court of Bankruptcy for the Birmingham district, and on the 28th of the same month protection was granted to him from all process until further order.

* 300 * On the 31st of October, 1859, the first sitting was held, and the following proposal was assented to by all the creditors then present:—

“Firstly. The said Isaac Thomas Perrins proposes to pay all and singular the persons mentioned and specified in the foregoing schedule as being creditors of the said Isaac Thomas Perrins, a composition of 5*s.* in the pound on the amount of their respective debts as stated in the said schedule, the same to be taken in full discharge and satisfaction of the said debt or debts so due and owing to them and each of them respectively by the said Isaac Thomas Perrins, and to be paid to them and each of them respectively, by the instalments, at the times and in manner following; that is to say, the sum of 2*s.* 6*d.* in the pound on the amount of their said debts, to be paid to the said creditors within one month

from the date of the resolutions of the creditors to be founded upon this proposal, agreeing to accept the same, being approved and confirmed by the Court ; and the further sum of 2s. 6d. in the pound on the amount of the said debts, to be paid to the said creditors within four months from the date of the approval and confirmation of the Court of the said resolutions of creditors.

“Secondly. That, to secure the due payment of the last instalment of the said composition, the said Isaac Thomas Perrins shall, within one week from the date of the aforesaid resolutions being confirmed by the Court, give to such of the aforesaid creditors respectively whose debts exceed 20*l.*, and to such of them whose debts are under 20*l.* as shall in writing request the same, his promissory note for the full amount of the said last instalment of the said composition, payable at the time aforesaid ; and the payment of the first instalment of the said composition and delivery of the aforesaid notes for the * last instalment of the said * 301 composition shall be deemed a carrying into effect of the resolutions of the creditors to be founded on these proposals, so as to entitle the said Isaac Thomas Perrins to a certificate of the Court of Bankruptcy under the 221st section of the Bankrupt Law Consolidation Act, 1849.

“Thirdly. That the creditors of the said Isaac Thomas Perrins shall accept the said composition and promissory notes in full discharge and satisfaction of their said debts, and shall not nor shall either of them sue or molest the said Isaac Thomas Perrins, or take any proceeding either at law or in equity against him, or issue any writ of execution or other process of any description whatever against his person or property ; and in the event of any or either of such creditors suing or molesting, issuing execution or other process, or taking any proceeding against the person or property of the said Isaac Thomas Perrins, then these proposals and the resolution or agreement to be hereafter founded thereon shall operate, and may be pleaded and given in evidence, as an effectual bar against all such executions or other process or proceedings, and all such executions or other process and proceeding shall be invalid and may be set aside ; and any Judge or other proper officer of the Court out of which such execution or other process and proceedings has been issued shall have full power and authority, on production of these proposals (if accepted), and of the orders to be made thereon, or of any office copy of such pro-

posals and orders, to set aside such executions, process or proceedings, at the costs, charges, and expenses of the person or persons issuing or taking the same."

At the second sitting, on the 7th of December, 1859, a creditor named Bloomer appeared by his solicitor to oppose the proposal, on the grounds that some of the * appellant's debts had been contracted by fraud and without reasonable probability at the time of contract of being able to pay them ; that he had not made a full disclosure of his estate and effects, and that he was not desirous of making a *bond fide* arrangement with his creditors. The only creditors who dissented from the proposal, besides Mr. Bloomer, were a firm of Messrs. Hipkins and Sons, who appeared by the same solicitor as Mr. Bloomer.

Mr. Bloomer, in his examination before the commissioner on the 7th of December, stated as follows: "I heard or knew Mr. Perrins had stopped payment. I did try to get my goods back after then, and if I could have got them back I should not have opposed ; but because he refused to let me have them back, I did threaten to render every opposition in my power."

The sitting was then adjourned, in order that all the creditors of the petitioner above the amount of 10*l*. might have notice of the opposition ; and it was ordered that all such creditors of the petitioner should have notice of the adjourned sitting, and should be invited to attend.

On the 21st of December, 1859, the adjourned sitting was held, and after an examination of the appellant and other witnesses, the commissioner expressed his opinion that the opposing creditors had failed in establishing any of the charges which they had brought forward, and that the opposition was vexatious ; but the commissioner said that a difficulty existed in his mind as to whether the proposal was reasonable and proper to be executed under the direction of the Court.

* 303 The commissioner ultimately made the following * order, which was the subject of the appeal : —

"This being the day by adjournment for holding the second private sitting under this petition, and after hearing Mr. John Smith on behalf of the petitioner in support of the proposal made by the petitioner, and Mr. Dignum in opposition thereto, and it being

shown to my satisfaction that the proposal of the petitioner for arrangement with his creditors is not reasonable and proper to be executed under the direction of the Court, I do adjourn all further proceedings under the said petition into the public Court, and I do hereby declare the petitioner bankrupt."

The balance-sheet showed stock in trade valued at 472*l.* 1*s.* 6*d.*, and credits to the amount of 2584*l.*, of which 499*l.* 10*s.* 3*d.* were considered good, 276*l.* 11*s.* 4*d.* doubtful, and 1808*l.* 17*s.* 8*d.* bad. The debts provable were estimated at 3920*l.*

The petition of appeal prayed that the adjudication might be annulled, and that it might be directed that the Court of Bankruptcy should approve and confirm such proposal, and that the appellant's costs of the appeal might be paid out of his estate or by the opposing creditors. The petition was served upon the official assignee and the opposing creditors.

Affidavits were filed in support of the appeal. Among them was one of an accountant who had examined the appellant's accounts, and deposed that 5*s.* in the pound was as much as the estate showed.

The appellant by his affidavit in support of the appeal stated that the proposal made by him was the best and most beneficial for his creditors that he was able to make; that the same was made *bona fide* and would * have been duly performed * 304 by him; and that it would have been advantageous to his creditors that it should have been executed and carried into effect. Another affidavit was also filed in support of the appeal, made by a Mr. Stokes, who had been for several years manager of the appellant's business, and by a Mr. Long, the appellant's cashier and bookkeeper. It stated that the deponents had carefully examined the books and accounts and stock in trade and effects of the appellant, and were satisfied and believed that the offer of the appellant for the compromise of his debts, as set forth in his proposal, was the best that could be made for the appellant and his creditors; and that if the trade of the petitioner were broken up by bankruptcy they did not believe that the assets of the petitioner would produce sufficient to pay a dividend of 2*s.* in the pound to the creditors. Another affidavit was also read, made by a Mr. Lord, who was a creditor of the appellant for 139*l.*, stating that the deponent was perfectly content with the offer and pro-

posal, and verily believed that in the event of a bankruptcy there would not be 2s. in the pound; and the witness further stated, that in his judgment the proposal was not only the best that the appellant could make, but was for his creditors the most reasonable and proper to be carried into effect.

Mr. De Gez and *Mr. George Brown*, in support of the appeal. — In the first place the Act of Parliament requires that, before the commissioner shall adjudicate a petitioner bankrupt, it shall be shown that the proposal is not reasonable and proper to be executed. The proper time for showing this must be the first sitting, because then the proposal may be modified so as to meet the objection. It is too late to show it after this meeting is passed, and when there is no longer an opportunity of modifying

* 305 * the proposal. But here it was neither shown at the first nor at the second sitting, nor is there even now any evidence to show, that the proposal is not reasonable. All the evidence is the other way. The proposal is, to pay a dividend of 2s. 6d. in the pound in cash, and to give promissory notes for a further dividend of the like amount. There are three wholly uncontradicted affidavits, to the effect that not more than 2s. in the pound would be paid under a bankruptcy. Therefore, if the promissory notes should never be paid, the creditors will gain 6d. in the pound by the arrangement going on instead of a bankruptcy, and the materials on which these calculations proceed entirely prove their accuracy. The 472l. 1s. 6d. at which the stock in trade was valued depended on it being sold in the ordinary course of business, and not under a bankruptcy, and the credits would only produce the estimated amount if got in gradually and with discretion. Another consideration is, that not only three-fifths but six-sevenths in number and four-fifths in value of the creditors are in favour of the arrangement. This (though not a circumstance directly material under the provisions of the section, under which three-fifths are as good as the whole body of creditors) is not to be disregarded, for it is strong evidence of the reasonableness of the proposal, and comes from those most interested in arriving at a correct conclusion. The objection suggested was, that the second instalment is secured only by the debtor's promissory notes. But that is a most usual form of proposal, and it would have destroyed many of the most advantageous arrangements which have been

made under the Act, if such a term in a proposal had been held of itself sufficient to render it unreasonable and incapable of confirmation, especially in a case where, as in the present, the actual money composition exceeds the dividend which would be realized upon a bankruptcy.

* *Mr. Bacon*, for the opposing creditors, was not called upon. * 306

THE LORD JUSTICE KNIGHT BRUCE. — It is rather a strong request to ask creditors to take the mere promissory notes of the debtor himself for half the proposed composition without security. The commissioner is empowered by the Act to exercise a judicial discretion upon the question whether the arrangement is reasonable, and he has exercised that discretion. I am clearly of opinion that the arrangement is not shown to be reasonable, or one which ought to be forced on reluctant creditors.

THE LORD JUSTICE TURNER. — The offer to pay 2*s.* 6*d.* in the pound and to give promissory notes for another 2*s.* 6*d.* at four months, not one farthing of which notes the maker may be able to pay when they arrive at maturity, is very clearly such an arrangement as cannot be considered reasonable. The appeal must therefore be dismissed.

Appeal dismissed, the respondents taking the 10*l.* deposit in satisfaction of their costs.

1859. December 19, 20. 1860. January 11. Before the Lord Chancellor Lord CAMPBELL.

By a trust-deed the trustees were empowered, by sale or mortgage of the trust estates, to pay specified debts, and secondly, the mortgages on the trust estates, with a direction, "out of the rents or any other moneys held by them upon the trusts of the deed," to pay an annuity to A. until the mortgages

should be paid off: *Held*, upon the import of the whole instrument, that "other moneys" had reference to those *ejusdem generis*, and that the annuity was payable out of income only.¹

THIS was an appeal by the plaintiff from the decision of the Master of the Rolls, reported in the 27th volume of Mr. Beavan's Reports, (a) so far as it declared that an annuity of 600*l.*, payable to the plaintiff under the trusts of a deed, ought to be raised out of the income only, and not out of the *corpus* of the trust estate.

The deed in question was dated in 1849, and made between the plaintiff Charles Thomas Clifford of the first part, his eldest son Henry William Clifford (a defendant) of the second part, and two trustees of the third part. It recited that the plaintiff and his eldest son were entitled as tenant for life and remainder-man in tail or in fee, respectively, and also had power to appoint the lands and hereditaments therein mentioned; that the said hereditaments and premises were subject to three mortgages of 50,000*l.*, 20,000*l.* and 10,000*l.*; and that the plaintiff with his said son (as surety) were also indebted on bond and other specialty and on promissory notes to the several persons named in the fourth schedule to the deed. By the witnessing part, the hereditaments and premises subject to the mortgages were conveyed by the plaintiff and his son to the trustees upon trust as they should think fit, by absolute sale of or by demising or mortgaging, or by transferring or directing the transfer of any existing mortgages and by charging the hereditaments, or by any other ways or means what-
 * 308 soever which to them should *appear expedient, to raise all such sums of money as they should think expedient for the purpose of fully performing or accelerating the performance of the trusts and purposes thereafter declared, or any of them, and to stand possessed of the moneys to arise therefrom upon the trusts thereafter expressed. They were also to manage the property and receive the rents and income upon the trusts thereafter declared. The trusts of the money thus to be raised were to apply and dispose of a competent part thereof in or towards payment, satisfaction, and discharge of the several debts or sums mentioned in the fourth schedule thereto (which were debts amounting to about 11,734*l.*, due from the plaintiff Charles T Clifford and his son), and interest. The deed then proceeded, so far as material,

(a) Page 209.

¹ See *Birch v. Sherratt*, L. R. 2 Ch. Ap. 644.

thus: And "do and shall, by, with, and out of the moneys aforesaid or any of them," redeem, pay off, satisfy, and discharge the said sums of 50,000*l.*, 20,000*l.* and 10,000*l.* respectively secured by mortgages on the estates, and all interest, and all such moneys as should be borrowed by the trustees and charged by them upon the trust premises: And, subject and without prejudice as aforesaid, upon trust until the mortgages should be paid off "by, with, and out of the rents and profits of the said manors and hereditaments, and the said assigned dividends, interest, and income, or any of them, or any other moneys in their or his hands upon the trusts of these presents," to keep down the interest on the three mortgages on such sums as should be borrowed by the trustees. And out of the rents, proceeds, and profits of the said manors and hereditaments, or such part thereof as should from time to time remain unsold, to pay the salaries of bailiffs, &c., and the taxes and outgoings, and keep up certain life policies; and, "subject to and after full performance of the trusts aforesaid, do and shall from time to time yearly and every year during the life of the said Charles Thomas * Clifford, or until such time or period * 309 as aforesaid, by, with, and out of the said rents, issues, and profits of the said manors and other hereditaments hereby appointed, and the said dividends, interest, and income hereinbefore assigned or any other moneys held by them or him upon the trusts of these presents, raise, levy, and pay unto the said Charles Thomas Clifford one annuity or yearly sum of 600*l.*" And in the next place, "by, with, and out of the said moneys, rents, profits, and income or any of them," levy, raise, and pay during the joint lives of Henry William Clifford and Charles Thomas Clifford unto Henry William Clifford an annuity of 100*l.*, and keep on foot certain policies on the life of Charles Thomas Clifford, and pay other annuities therein mentioned, and pay so much or such part of the "income" of the trust funds "as shall remain after or not be applied towards answering the trusts and purposes aforesaid" to the plaintiff for life. And the unsold hereditaments and premises were to be held in trust for Henry William Clifford, his heirs, executors, administrators, and assigns, absolutely.

Under these trusts the trustees sold the greater part of the hereditaments, and applied the proceeds in the first place in payment of the three mortgages, which were, before the 24th of June,

1854, fully paid off, but the greater part of the debts in the fourth schedule then remained unpaid.

The trustees refused from June, 1854, to continue the payment of the annuity of 600*l.* a year to the plaintiff, on the ground that, as all the mortgages on the estate had been then paid, the annuity to the plaintiff thereupon ceased to be payable.

The plaintiff by his bill sought a declaration, that according to the true construction of the deed the annual *sum of 600*l.* thereby limited to the plaintiff had continued and would continue payable to the plaintiff during his life, or until the whole not only of the mortgage debts and interest, but also of the bond and other debts and interest properly payable under the trusts of the indenture, should have been fully paid and satisfied; and that such annual sum of 600*l.* was raisable out of the *corpus* of the said hereditaments.

By the decree made at the hearing of the cause at the Rolls, and now under appeal, it was declared that the annuity was payable until not only the mortgage debts and interest were satisfied, but also until payment of the bond and other debts payable under the trusts of the indenture. His Honor, however, decided that the annuity could only be raised out of the income of the trust property.

Mr. R. Palmer and *Mr. W. H. G. Bagshawe* appeared for the plaintiff, in support of the appeal. — They referred to *Torre v. Browne*. (a)

Mr. Lloyd and *Mr. Ellison*, for the defendants, the trustees of the deed. — They referred to *Miller v. Huddleston*. (b)

Mr. Selwyn and *Mr. Baggallay*, for the other defendant, Henry William Clifford.

Mr. W. H. G. Bagshawe replied.

Judgment reserved.

(a) 5 H. L. Cas. 555.

(b) 3 Mac. & G. 513 [(Am. ed.) cases in note (2)].

1860. January 11.

*THE LORD CHANCELLOR.—The only question raised by *311 this appeal is, whether the annuity of 600*l.* directed to be paid to the appellant by the trust-deed referred to, is charged upon the *corpus* as well as the income of the trust estate. I think that the Master of the Rolls properly decided that it was charged upon the income only.

This does not depend upon any abstract rule of law, but entirely upon the intention of the parties, to be gathered from this long and complicated deed. Having carefully perused it, I have only to state the result of my consideration of its scope and of its clauses. Authorities were cited during the argument, but they are of no assistance to me, for I have to determine in what sense words are here used,—the words being such as by themselves might bear the construction which either party imputes to them.

The rule is not disputed, that where, after a specific enumeration of different subjects, general words are added, the general words are to be confined to subjects *ejusdem generis*.¹

The appellant's counsel first rely upon the power given to the trustees to demise, sell, or mortgage "for the purpose of raising all sums of money they should think it necessary to raise for performing the trusts of the deed or any of them." But when the trusts are afterwards declared, particular directions are given as to the funds from which particular payments are to be made. Some of these are clearly to be made out of income exclusively; and with respect to others meant to be charged upon *corpus* there is an express power given to sell and mortgage, *or to "pay *312 out of the principal of the trust moneys stocks, funds, and securities."

The claim made by the appellant must therefore rest upon the clause by which it is declared that the trustees do and shall during his life "by, with, and out of the said rents, issues, and profits of the said manors and other hereditaments hereby appointed, and the said dividends, interest, and income hereinbefore assigned, or any other moneys held by them upon the trusts aforesaid, raise, levy, and pay unto the said Charles Thomas Clifford one annuity or yearly sum of 600*l.*," &c. Without the words "or any other moneys held by them upon the trusts aforesaid," it is quite clear

¹ See 1 Jarman Wills (3d Eng. ed.), 721, (4th Am. ed.), 600 *et seq.* and notes.

that the annuity would only be charged upon income, and I cannot think that those words indicate an intention to charge it upon *corpus*. I doubt not that it was in contemplation both of son and father that the father should receive the full allowance of 600*l.* out of the property assigned to the trustees; and I cannot properly be influenced by the affidavit said to be filed stating that the father had represented that the income would be abundantly sufficient for this purpose. But, looking to the deed itself, which provides for the disposition of the surplus of the income, I think both parties contemplated that there would be a surplus, after the annuity had been paid out of it. The words relied upon are very inapt to charge the annuity upon *corpus*; and other clauses show that the framer of the deed knew well how a charge on *corpus* was to be made. "Other moneys held by the trustees" must be taken to mean other moneys of the same kind as the moneys before specified, which were exclusively income. The difficulty as to what those other moneys could be, if the *corpus* is excluded, was, I think, sufficiently removed by the suggestion of the Master of the Rolls,

that the words might well refer to casual receipts of money
 * 313 in respect of the * real estates,—such as fines on the renewal of leases for lives,—so that there seems no ground for saying that the trustees, for the purpose of paying the arrears of the annuity, were to sell or mortgage the lands assigned to them in trust.

For these reasons I think that the appeal must be dismissed with costs.

BOLDERO v. THE EAST INDIA COMPANY.

1859. December 12, 13, 14. 1860. January 11. Before the Lord Chancellor
 Lord CAMPBELL.

A fund was created for providing retiring pensions of 1000*l.* a year for civil servants of the East India Company in Bengal, after twenty-five years' service. The fund was derived from the accumulations of a deduction of 4*l.* per cent on the salaries of the civil servants, with an equal amount contributed by the East India Company. A scale of the values of the annuities, according to the ages of the annuitants, was fixed, and a civil servant retiring with an annuity, if the amount subscribed by him, together with its accumulations,

were less than one-half of the tabular value of his annuity, was bound to make up the deficiency. The contrary happened to the plaintiff, whose subscription amounted to considerably more than half the value of the annuity. *Held*, that he was not entitled to have the excess refunded.

THIS was the appeal of the plaintiff from the dismissal by the Master of the Rolls of the plaintiff's bill seeking a "refund" or repayment by the East India Company of the accumulated amount of the plaintiff's subscription to the "Bengal Civil Service Annuity Fund," and interest in excess of half the value of the annuity payable to him out of that fund.

The Bengal Civil Service Annuity Fund was formed in Bengal in 1827, with the object of supplying annuities for the retirement of civil servants every year, of such an amount and attainable on such terms as to induce a considerable number of the civil servants to retire in each year, and thus to make way for others.

* To accomplish the objects for which the fund was pro- * 314
vided, rules and regulations were made for the administration of the fund, and were contained in certain written documents, to have a construction put upon which the present suit was instituted.

These rules and regulations, and the general history of the formation of the fund, are referred to in detail in the report of the hearing of the case at the Rolls in the 26th volume of Mr. Beavan's Reports, (a) and also in the Lord Chancellor's judgment.

The general effect of the scheme was as follows : —

Every one of the Bengal civil servants was to subscribe to the fund four per cent out of his official income and emoluments ; this was to accumulate at compound interest at six per cent until he retired, and an equal sum was to be contributed every year by the East India Company and accumulated in the same manner. Separate accounts for each subscriber were kept, to determine the accumulated value of his subscriptions.

Out of the fund thus created nine life-annuities of 10,000 rupees, or 1000*l.* sterling, each were annually provided, for nine civil servants upon their retirement, who had been twenty-five years in the service, and had resided in India not less than twenty-two years.

Every civil servant as soon as he had fulfilled these conditions was entitled, provided the pensions then available were not taken by his seniors, to the retiring pension of 1000*l.* per annum for his

life, on payment of so much money as, together with the fund created by his subscription of four per cent out of his official income accumulated at compound interest at six per cent,

* 315 would * amount to half of the value of such an annuity, as, with reference to the age which he had then attained, was shown in the table of the values of such annuities appended to the regulations.

The plaintiff entered the civil service of the East India Company in the year 1827, he retired in the year 1852, having been twenty-five years in that service, of which twenty-two years had been spent in India. He was then sixty-one years of age, and entitled to the annuity of 10,000 rupees, or 1000*l.* sterling, at the price of 38,085 rupees, which, according to the table appended to the regulations, was half the value of that annuity for the remainder of his then life. The balance then standing to the credit of the plaintiff in the books of the trustees and managers of the Bengal Civil Service Annuity Fund was 87,504 rupees, which, after deducting the 38,085 rupees, left a surplus to his credit of 49,419 rupees.

As there was no express provision in the regulations as to the application of any surplus which might be left of the amount of subscriptions paid by an annuitant, over and above the prescribed amount to be made up by him on receiving the annuity, the present suit was instituted to determine the rights of the parties with respect to the above surplus of 49,419 rupees.

Mr. Butt, Mr. Rolt, Mr. R. Palmer, and Mr. Freeling appeared for the plaintiff, in support of the appeal.

The Attorney-General, Mr. Lloyd, and Mr. Mellvill, for the East India Company.

Mr. Follett and Mr. Rogers, for the managers of the fund.

* 316 * *Mr. E. Macnaghten,* for two subscribers, who had not paid the half value and had not accepted annuities.

Mr. Rolt, in reply.

The following cases were referred to: *Robertson v. The East*
[242]

India Company, (a) Davis v. The Trustees of the Madras Civil Service Annuity Fund. (b)

Judgment reserved.

1860. January 11.

THE LORD CHANCELLOR. — Having carefully perused all the documents produced, and reconsidered all the arguments urged on both sides in this important cause, I have arrived at a clear opinion that the decree of the Master of the Rolls ought to be affirmed.

The plaintiff's claim rests upon contract, and he is bound to show that by some contract, express or implied, he is entitled to recover from the East India Company the sum for which he sues.

The ground of "resulting trust" was too fanciful to be gravely relied upon.

But, in support of the appeal, it was strenuously contended, first, that when the fund in question was originally established there was a contract between the Bengal civil servants then in the employment of the East India Company and the East India Company that if, when a civil servant was to retire from the * service and accept the annuity of 1000*l.* a year, his con- * 317 tributions to the fund with interest at six per cent should be found to have exceeded half the estimated value of the annuity, the excess should be then refunded to him; and, secondly, that if this was not the original contract, a new contract to this effect was to be inferred from the subsequent dealings between the parties.

First. The original contract is to be discovered chiefly in the public letter dated the 8th of December, 1824, containing the terms which were proposed by the East India Company to the Bengal civil servants, and which the Bengal civil servants accepted. I entirely concur with the reasoning of the appellant's counsel, that in considering the effect to be given to this document regard is to be had to all the seventy-eight paragraphs of the despatch as well as to the regulations and tables which follow.

But regulation first says, "The subscribers shall, from the 1st of May, 1825, contribute for the purposes of the fund one twenty-fifth

(a) Reported on appeal, *nom.* The East India Company v. Robertson, 7 Moore's Indian Appeals, 361.

(b) *Ibid.* 364, n.

part of their salaries, and all other public emoluments howsoever denominated, compensation for travelling expenses excepted." From this and all the subsequent regulations it is quite clear that the contribution was to be made by the civil servants as long as they remained in the service of the company in India, and that it was to be in the nature of a subscription to be applied to specified purposes. If the contributions were settled in account by a deduction from the salaries or allowances due to the civil servants, the effect was the same as if the civil servants had received payment in full of all that was due to them and they had afterwards paid their subscriptions in hard money to the treasurer of the fund.

This money ceased to be theirs. They had an interest in * 818 the fund as defined by the regulations, * but no further, and they gave full authority that their money so contributed should be applied to all the purposes to which the fund was applicable. A separate account was kept of the amount of the contributions of each subscriber, but this was essentially necessary by reason of the regulation, that if, when the annuity was to be granted, these contributions, with interest, did not amount to half the estimated value of the annuity, the subscriber was obliged to make up the deficiency. There is a regulation expressly requiring this deficiency to be made up; but as to refunding to the subscriber, should his contributions have exceeded half the estimated value of the annuity (a case which must necessarily occur not unfrequently), there is a profound silence. This we were told is *casus omissus*. The expression *casus omissus* in construing an Act of Parliament I fully understand, but *casus omissus* in construing a contract is new to me. The just result, I think, is that it is no part of the contract. If the reasoning merely be, that, although not expressed, it is to be implied as the presumed intention of the parties, the principle on which this reasoning proceeds is legitimate.

The chief reliance is placed upon paragraphs 52, 53, and 57 of the despatch of the 8th December, 1824, declaring that, "as far as may be practicable, the advantages afforded by the fund should be available by those eligible to receive them, upon terms of strict equality;" that it was intended "to maintain a strict equality;" and that "all the servants becoming annuitants will pay half the value of their respective annuities and no more, and will so far be placed upon an equal footing."

But "strict equality" here means equality of potentialities to all the subscribers; not that, after all the various chances and risks and vicissitudes encountered in *their career, all, *319 in the result, should have an exactly equal pecuniary advantage.

The regulations themselves show and declare such an equality to be impossible. Regulation 57, so often quoted, refers to payments to be made by subscribers, "upon becoming annuitants," where the contributions already made did not amount to half the value of the annuity; in which case the total payments would be equal to half the value of their respective annuities and no more, and they would be placed upon an equal footing.

If it had been intended that, where the contributions exceeded half the value of the annuity, there should be a refunding, no reason can be suggested why this should not have been expressly provided for as well as the payment of the deficiency.

If such had been the intention of the parties, no reason can be suggested why the contribution by the subscribers should not have ceased at a period, to be easily ascertained, when the subscriber had contributed half the maximum value of his annuity, the value becoming less and less as his years advance. The notion that this fund was in the nature of a savings-bank, in which the money of the subscribers was to accumulate for their benefit, is wholly inconsistent with the principle and with the details of the scheme. It is only by the grant of the annuity that the subscriber can be benefited, and if he dies or quits the service without an annuity it is admitted that all his contributions are lost to him and his representatives.

Nor is it easy to see, if there was always to be a refunding, whence the money to be refunded should come, such payments possibly exhausting the fund, and *the annuitant *320 who calls for the refunding having consented that his contributions which he now requires to be refunded should be applied to satisfy a similar demand from prior annuitants.

But to show that this refunding could not have been in the contemplation of the parties, it is only necessary further to observe, that it would have a strong tendency to defeat the object which both parties had in view when the fund was to be established.

The company had felt, and the civil servants had felt, that promotion was too slow, and that for want of a retired allowance men

remained holding office with important and onerous duties when their physical and mental vigour had been materially impaired. The cry on both sides was, "Quicken the movement." But by the annuity scheme, instead of holding out an inducement for early retreat, if the subscriber was sure that by remaining in the service the sum he would have to pay for his annuity would be constantly diminishing, and the sum he would have to receive by refunding would be constantly increasing, a temptation would be held out to continue in the service when retreat would be more becoming; and, instead of a "quicker movement," the result would be more mischievous stagnation.

It was said that sufficient attention had not been given to the fact that the scheme partakes somewhat of the nature of a tontine.

The only allusion to a tontine in the despatch of the 8th December, 1824, is the truism in paragraph 38: that, "if an annuity fund were formed solely by the subscriptions of individuals, the ultimate advantage to each subscriber could only exceed the

* 321 value of his subscriptions * to the extent that the fund may have gained by the accumulated contributions of subscribers resigning or dying previously to their being entitled to annuities; so that the benefit to the service would in that case be restricted to the contingent results of a tontine."

But longevity has no advantage in this scheme, except the lengthened enjoyment of the annuity; and the object of it was, early competence to the young, not an accumulation of riches to the aged.

"Contemporaneous exposition" was talked of; but (as will be seen presently) there was no dealing under the contract in Bengal which can be considered favourable to the appellant; and what was done in Madras or Bombay was *res inter alios acta*. I therefore decide that the plaintiff's claim cannot be supported on the original contract; and I come to consider whether there be evidence of a new contract to support it.

Of course the *onus* lies on the plaintiff to show that there was such a new contract;—to which the assent of both parties is proved, or may be fairly inferred. But I really am much at a loss to know the evidence which is here relied upon. I asked the counsel for the appellant, who so ably argued his case, "at what point of time, or on the happening of what event, they contended

that this new contract had been entered into, so as to be binding on both parties?" I could elicit no satisfactory answer.

There certainly was no new contract during the first ten years of the scheme, from 1825 to 1835.

The scheme was then found to be working unsatisfactorily. * The general opinion seems to have been, that it * 322 did not hold out a sufficient inducement to take annuities and to retire.

A new contract was entered into. But what was this new contract? Not that the original contract should be in force for an indefinite length of time with a new term engrafted upon it, that when a subscriber took an annuity, if his contributions amounted to more than half the value of the annuity the excess should be refunded to him; but that, to encourage retirement, an experiment should be made for three years and no longer, and that during those three years a subscriber, who had been in the service the required period, should be entitled to the annuity at one-fourth instead of one-half of its value, and should have this additional advantage, that he should receive back the contributions beyond one-quarter of the value of the annuity. This new agreement was in force for three years, from 1835 till 1838. It then expired, and the original agreement must be considered in full force, unless subsequently altered.

But, although negotiations were carried on, rather in a desultory manner, for several years, and some loose expressions were used, showing that the parties did not clearly understand the meaning of each other, they came to no new agreement down to the time when this litigation began with the action of *Blunt v. Halliday* in the Supreme Court at Calcutta. There could be no use in going minutely through these negotiations, as in the result they certainly were abortive. Nor has there been in Bengal any thing like a usage of refunding under the original agreement. The refunding under the express stipulation of the agreement, of 1835 can be of no avail to the plaintiff, and he might as well contend that he is entitled to the annuity at one-fourth of its value as that, * paying half of its value, he is entitled to recover back the * 323 surplus of his contributions beyond that amount.

As to authority, I have been pressed with the judgments of Sir CHRISTOPHER RAWLINSON, Chief Justice of Madras, in *Davis v. The*

1860. January 11, 12. Before the Lord Chancellor Lord CAMPBELL.

Upon the construction of an agreement to demise a farm for fourteen years, "at the yearly rent of 40*l.*, payable quarterly, free of all out-goings;" and by which the parties agreed "to grant and accept a lease on the above and other usual terms:" *Held*, that the landlord was entitled to a net rent, payable free of land-tax and tithe commutation rent-charge.

THIS was the appeal of the defendant from the refusal of Vice-Chancellor STUART to vary his chief clerk's certificate approving of the terms of a draft lease of a farm in pursuance of a written agreement, the frame of the draft lease having thrown on the lessor the tithe commutation and the land-tax.

The case is reported, upon the hearing of the motion before the Vice-Chancellor to vary the certificate, in the first volume of Mr. Giffard's Reports. (a)

On the 3d of October, 1851, Samuel Rowles Pattison, who was seized for an equitable estate in fee-simple in possession of the farm, entered into the following written agreement with the plaintiff:—

"The undersigned Samuel Rowles Pattison, as landlord, hereby agrees to let, and the undersigned Joseph Parish to take, as tenant, all the farm in and called Tinnye, in the parish of Bridgerule, late in the occupation of Thomas Leigh and now of the said landlord, for a term of fourteen years from Lady-day next, determinable at the end of the first seven years thereof, at the yearly rent of 40*l.*, payable quarterly, free of all outgoings."

After other stipulations, not material to be stated, the agreement concluded thus:—

* 327 * "The said parties agree to grant and accept a lease on the above and other usual terms.

"Dated the 3d of October, 1851.

"The mark of + JOSEPH PARISH."

(Signed)

"S. R. PATTISON.

(a) Page 238.

The plaintiff was at once let into possession of the demised premises, and had ever since continued in possession.

In 1857 the estate, both legal and equitable, in the reversion of the premises became vested in Maria Sleeman in fee, in trust for the defendant, subject to the plaintiff's tenancy of the farm upon the terms of the agreement. The plaintiff had regularly paid to Pattison, and those claiming under him, a net rent of 40*l.* a year in respect of the premises; but shortly after Christmas-day, 1857, Maria Sleeman, on behalf of the defendant, distrained upon the plaintiff for a quarter's rent claimed to be due for the farm on that day, and the plaintiff accordingly paid 10*l.* in respect of that quarter's rent without deduction, and also the costs of the distress.*

On the 26th of February, 1858, Maria Sleeman conveyed the farm to the defendant Samuel Sleeman in fee. The defendant having refused to accede to the plaintiff's application for a lease pursuant to the terms of the agreement, the plaintiff instituted the present suit for the specific performance of the agreement, which was resisted by the defendant on the ground of certain breaches of the agreement, alleged by him to have been committed by the plaintiff. A decree for specific performance having, however, been made, a reference was directed to Chambers in the usual manner to settle the *conveyance under which the chief * 328 clerk made the certificate, which the Vice-Chancellor had refused to vary.

Upon the appeal, an affidavit was read on behalf of the plaintiff, in which he deposed that on the occasion of a plaint being entered against him in January, 1858, by Maria Sleeman, in the County Court held at Halsworthy in Devonshire, for damages in respect of a breach of one of the stipulations of the agreement, alleged to have been committed by him, he obtained a copy of the agreement in question; that until that time he had never had a copy thereof, nor had any such copy or the original agreement ever been read or shown to him; that he did not remember all the terms of the agreement, and therefore, prior to his having obtained a copy thereof, and in ignorance of its contents and under a misapprehension of his rights thereunder, he had paid the land-tax and some of the rent-charges in lieu of tithes which had become due in respect of the farm; that, moreover, Pattison and his immediate successor in title were kind landlords to the plaintiff, who did not think his interests were likely to be advanced by requiring from either of them a

strict performance on the lessor's part of the agreement; that since the 18th of January, 1858, he had never paid any tithe rent-charge till compelled by actual threat of distress of his goods, and then to prevent it, and that on such occasions, as well as in January, 1858, he had distinctly protested that it was not his duty to pay it.

On behalf of the defendant on the other hand, evidence was read showing that, according to the general custom of that part of the country in which the premises in question were situate, a lease granted pursuant to a previous agreement for a lease of a
 * 329 farm "on the usual * terms" would make the land-tax and tithe commutation charge fall upon the landlord.

Mr. Speed, for the appellant. — By the word "outgoings" in the agreement are meant those charges which, in the absence of any enactment or stipulation upon the subject, would fall upon the landlord. The land-tax and tithe rent-charge are here the only charges so circumstanced, and if they are not included in the word "outgoings," that word becomes insensible. It was argued below that, as well might the property tax be included in the term; but, by the Act creating that tax, it is made a landlord's charge, payable by the occupant, but by him to be deducted from the rent; and it is expressly enacted that no contract between landlord and tenant touching the payment of taxes and assessments is to be construed as extending to the property tax, or to be binding contrary to the intent and meaning of the Act; but that such duties shall be paid by the occupiers, subject to such deductions and repayments as authorized by the Act, and all such deductions and repayments shall be allowed notwithstanding such contract. A rent "free of all outgoings" is equivalent to a "net rent," which has been decided to mean a rent clear of all deductions to which it otherwise would be liable, including land-tax, sewers' rate, &c. *Bradbury v. Wright*, (a) *Marshall v. Wisdale*, (b) 20 Vin. Abr. tit. Taxes (D), (c) *Smith v. Anderson*, (d) *Bennett v. Womack*. (e) That this was also the sense in which the term was understood by the plaintiff is shown by his conduct in paying the rent without claim-

(a) 2 Doug. 624.

(d) 4 Russ. 352.

(b) Freem. K. B. & C. P. Rep. 148.

(e) 7 B. & C. 627.

(c) Page 159.

ing the deduction now contended for, down to 1858, when disputes arose between him and Maria Sleeman.

* *Mr. Hobhouse*, for the plaintiff. — The words here used * 330 are perfectly general, and without something more specific or expressly pointed the Court will not take from the tenant his right to deduct the charges in question. *Cranston v. Clarke*. (a) The parties to the agreement are, the landlord, whose solicitor prepared it, on the one hand, and an illiterate person, a marksman, on the other. The *onus* of showing by strict proof that “outgoings” can refer to no charges but those contended for by the defendant is upon the landlord. “Free of outgoings” will have a perfectly sensible meaning if referred to those small deductions which tenants sometimes insist upon, as for repairs, fences, and other little matters of account between them and their landlords. The cases which have been cited are distinguishable. *Smith v. Anderson* (b) was the case of a gift by will of an annuity without any deduction whatsoever, and from the nature of the property out of which the annuity was to be paid there could be no deduction except in respect of the legacy duty. It was held, therefore, that the word deduction referred to legacy duty. *Bennett v. Womack* (c) was not a case between landlord and tenant, but of the assignment of a lease; and the only question was, whether the assignor had misrepresented to the assignee the nature of the interest which he had to assign. In *Bradbury v. Wright* (d) the question arose upon a grant by deed of a rent-charge, not upon a reservation of rent by agreement, and the words there used were more express. In the other cases cited taxes were expressly referred to, and that is not so here. The words being merely general, do not extend to burdens which the law has cast on the landlord. It is submitted, moreover, that this cannot be regarded as a term usual in such leases. A usual term means nothing more than a term incidental to the nature * of the grant, as * 331 husbandry clauses and the like. *Church v. Brown*. (e) It does not extend to terms collateral to the grant. The question is one simply of construction, having regard to the rights and the probable intention of the parties. All grants are to be construed

(a) *Sayer*, 78.

(d) 2 Doug. 624.

(b) 4 Russ. 352.

(e) 15 Ves. 258.

(c) 7 B. & C. 627.

strictly as against the grantor, and doubtful or ambiguous words are to be interpreted in the sense most favourable to the grantee. *Doe d. Webb v. Dixon.* (a)

Mr. Speed, in reply. — Of the authorities cited, *Cranston v. Clarke* (b) alone is against us; the others in our favour. In all these the question arose upon deeds, which are always construed more strictly than a mere executory contract to be performed by the Court.

Judgment reserved.

January 12.

THE LORD CHANCELLOR. — The only question before me in this case is, whether, upon the true construction of an agreement dated the 3d of October, 1851, between the plaintiff and one Pattison, for demising a farm by the latter to the former for fourteen years, “at the yearly rent of 40*l.*, payable quarterly, free from all outgoings,” and by which “the parties agreed to grant and accept a lease on the above and other usual terms,” the lease to be granted should or should not entitle the tenant to deduct from the rent the land-tax and the tithe commutation rent-charge payable in respect of the farm?

The Vice-Chancellor held that the land-tax and tithe * 332 * rent-charge were to fall upon the landlord, the tenant not being deprived by the words of the agreement of the right, which he would otherwise have had, to deduct them from the rent of 40*l.* According to the only report of the case, which is in the *Law Times* of November 19th, 1859, the *ratio decidendi* is given as follows: “These are outgoings not from the tenant at all, and in respect of which, but for the default of the landlord in discharging the duties of landlord, the tenant would be under no liability. They are not, therefore, outgoings of the tenant in the sense of this agreement.” After mature consideration I am not able to agree with the Vice-Chancellor in this conclusion. By the Acts of Parliament upon this subject the tenant is made primarily liable, both for the land-tax and the tithe rent-charge. He is bound to pay both, although, having made the payments, he is entitled to

(a) 9 East, 15.

(b) Sayer, 78.

deduct both from the rent due from him to the landlord. Therefore both are "outgoings" of the tenant in respect of his occupation of the demised premises. The consequence is, that instead of these outgoings being deducted from the 40l., the 40l. should be paid to the landlord free from such outgoings.

The evidence strongly supports this construction; for it is sworn and stands uncontradicted, that according to the invariable custom of the country, where there is an agreement for a lease of a farm "on the usual terms," the lease makes the land-tax and tithe commutation rent-charge fall upon the tenant; and the plaintiff himself having taken possession of the farm under this agreement in the Autumn of 1851, from thence till the year 1858, when a dispute arose between him and his landlord on other points, continued regularly to pay the 40l. a year without claiming any deduction for land-tax or tithe commutation charge. *Mr.*

Hobhouse, who very ably * argued for the tenant, was unable * 333 to point out any "outgoings" to which the words in the agreement could apply, unless the payments made by the tenant for which the tenant was primarily liable, but which without a special stipulation would ultimately fall upon the landlord. He contended that they were merely words of form, introduced by a country conveyancer without any meaning. But I cannot consider them wholly inoperative, when a very sensible meaning may be put upon them, making this agreement accord with the general custom of the country upon this subject between landlord and tenant.

Mr. Hobhouse mainly relied upon the decision of the Court of King's Bench in *Cranston v. Clarke*, (a) which no doubt is closely in point. But this authority seems to me to be outweighed by the subsequent decisions cited on behalf of the appellant, particularly *Bradbury v. Wright*, (b) and *Bennett v. Womach*. (c)

Upon the whole I am of opinion that the appellant ought to succeed, and that the certificate of the chief clerk should be varied by making the rent reserved by the lease payable free of land-tax and tithe commutation rent-charge.

(a) *Sayer*, 78.

(b) 2 Doug. 624.

(c) 7 B. & C. 627.

1859. December 19, 20, 22. 1860. January 18. Before the LORDS JUSTICES.

L., a partner in the firm of B. & Co., retired from it, and shortly afterwards borrowed from the plaintiffs 20,000*l.* on his promissory note payable on 31st May, 1848, and agreed by way of collateral security to give them a lien on his share of the assets of the partnership, which had not yet been ascertained and paid. In furtherance of this, B., one of the continuing partners, in July, 1847, at L.'s request, and with the consent of the other continuing partners, gave the plaintiffs an order on C. & Co., the agents of B. & Co., directing them to pay to the plaintiffs, out of the funds of B. & Co. in their hands, the sum of 5000*l.*, and engaged to pay to the plaintiffs the residue of L.'s share. C. & Co. had not at the time, nor afterwards, nearly so much as 5000*l.* of B. & Co.'s money in their hands. In August, 1847, the plaintiffs presented the order to C. & Co., and were informed they had not funds to pay it. The plaintiffs gave B. no notice of this. In September, 1847, C. & Co. became insolvent, without having paid any part of the 5000*l.* The promissory note was dishonoured. B. died in February, 1849. The share of L. was finally ascertained in 1853, and L. died in March, 1855. In November, 1855, the plaintiffs filed this bill to enforce their lien.

Held, that the equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange, and that as the plaintiffs could not have obtained payment of the 5000*l.* from C. & Co., they could not be charged with that sum.

Held, also, that the plaintiffs were not under the circumstances barred from relief by delay, there being no statutory bar.

Held, also, that the loss occasioned by the failure of C. & Co. having money of B. & Co. in their hands, was to be treated as a loss of the new firm of B. & Co. not affecting the share assigned to the plaintiffs.

THIS was an appeal by the defendants from a decree of Vice-Chancellor STUART. The plaintiffs, who represented the firm of Glyn & Co. the bankers, were the assignees, by way of mortgage for securing to them the sum of 20,000*l.*, of the share of the late Sir George Larpent in the assets of a partnership of Bell & Co., in which he was a partner, and which determined in the year 1846; and the principal question on the appeal was, whether the plaintiffs ought to be charged with a sum of 5000*l.* alleged to have been receivable by them from the late firm of Cockerell, Larpent, & Co. on account of Sir George Larpent's share in the partnership of Bell & Co., the Vice-Chancellor having decided that the plaintiffs ought not to be so charged.

The partnership of Bell & Co., in which Sir George * Larpent was a partner, was formed in the year 1843, for * 335 the purpose of carrying on business at Canton, in China, for the term of three years; and by the articles of partnership it was provided that the accounts should be settled and the assets divided within eighteen months after the determination of the partnership. The partnership terminated on the 31st of December, 1846. Sir George Larpent then retired from the concern, and it seems to have been assumed, on all sides, that his share of the partnership assets became payable on the 31st of May, 1848. After the retirement of Sir George Larpent, the remaining partners in the Canton firm formed a new partnership, and continued to carry on the business under the same firm of Bell & Co. Mr. Bell, who was one of the partners, resided in this country, and was the managing partner here.

Sir George Larpent, whilst engaged in the firm of Bell & Co., was also a partner in the firm of Cockerell & Co., who carried on the business of East India agents in this country. That firm also determined, at the end of the year 1846, and was succeeded by the firm of Cockerell, Larpent, & Co., in which Sir George Larpent was also a partner. The firm of Cockerell, Larpent, & Co. were the London correspondents of the new firm of Bell & Co., and by an agreement between those firms, Bell & Co. were at liberty to overdraw their account with Cockerell, Larpent, & Co. to the extent of 25,000*l*.

In the month of July, 1847, Sir George Larpent applied to Glyn & Co. to advance him the sum of 20,000*l*. on the security of what would be coming to him in respect of his share of the partnership assets of the old firm of Bell & Co., assumed, as it has been mentioned, to become payable on the 31st of May, 1848, and * in order to effectuate this transaction, the sev- * 336 eral letters following passed between the parties.

On the 10th of July, 1847, Sir George Larpent wrote to Glyn & Co. in these terms:—

“ Dear Sirs,— My partnership with Messrs. Bell & Co., of Canton, having terminated on the 31st December last, I am entitled by its conditions to receive payment of my capital stock on the 31st May next. The amount thereof, clear of all claims, may be taken roughly at 25,000*l*., and I am informed by Mr. William Bell

that a portion of the balance at credit with Messrs. Cockerell, Larpent, & Co., on account of Messrs. Bell & Co., say about 4000*l.* or 5000*l.*, will be appropriated towards payment of the same. In pursuance of the arrangements between me and your firm, I hereby authorize Mr. William Bell, acting for Messrs. Bell & Co. in this country, to pay to you the amount of my said capital stock, say 25,000*l.* or thereabouts, and your acknowledgment thereof will be a sufficient discharge; and I hereby bind myself to enter into such further covenants and engagements as you may require in order to give you a full and perfect lien thereon, such as you may think necessary to secure to you an exclusive title to the said balance, the same being in consideration of, and as a collateral security for, your advances now due, or which may be hereafter due, by the house of Messrs. Cockerell, Larpent, & Co. to your firm."

On the same 10th of July, 1847, Glyn & Co. wrote to Mr. Bell as follows:—

"Sir,—On the other side we beg to hand you a copy of a letter, addressed to us this day by Sir George Larpent, authorizing you to pay to us 5000*l.*, at present in the hands of Messrs. Cockerell & Co., part of the surplus partnership assets of his late firm * 337 of Messrs. Bell & Co., of Canton, together with * the balance of his capital of 20,000*l.* or thereabouts; and we shall be obliged by your acknowledging the receipt of this letter, and intimating to us, in conformity thereto, that the 5000*l.* above alluded to will be paid to us; and also that your present firm will in due course make payment to us of the balance remaining due to Sir George Larpent on account of his capital, say 20,000*l.* or thereabouts."

This letter was placed in the hands of Sir George Larpent, and was forwarded by him to Mr. Bell, on the 12th July, 1847, in a letter of that date, which also contained a copy of Sir George Larpent's letter, set out above, and the draft of the answer proposed to be returned by Mr. Bell, to Glyn & Co.'s letter of the same date.

The letter of the 12th July, 1847, from Sir George Larpent to Mr. Bell, was as follows:—

"Dear Sir, — I have made arrangements with my friends Messrs. Glyn & Co. for an advance of 20,000*l.* on the balance forthcoming to me on the 31st May, 1848. In order to carry the same into effect in a business-like manner, I have written to Messrs. Glyn & Co. the letter of which I hand you a copy, and I enclose also their letter to you, and the draft of a letter which they and I request you will be so good as to sign and return through me. The object you will easily see: it is to give Messrs. Glyn & Co. a complete lien on my said balance, and to guard against any disturbance of the arrangements by my death. Your early attention to the business of this letter will oblige."

On the 14th of July, 1847, Mr. Bell wrote to Glyn & Co. in these terms: —

"Gentlemen, — I beg to acknowledge the receipt of your letter of the 10th instant, covering copy of a letter of same date from Sir George Larpent to yourselves, authorizing me to make payment * to you of 5000*l.* on account of his capital with * 338 Bell & Co., Canton, and also to make further payment to you of the remaining balance of capital in that firm, say together 25,000*l.* or thereabouts. In compliance with your request, and with Sir George Larpent's letter above alluded to, I beg to acquaint you that I have instructed Messrs. Cockerell & Co. to transfer to yourselves, from the surplus partnership assets of Bell & Co. in their hands, the sum of 5000*l.*, on the receipt of which you will please grant me an acknowledgment; and on behalf of myself and partners in the present Canton house, I engage to pay you, in due course, the remaining balance of Sir George Larpent's capital with them, say 20,000*l.* or thereabouts."

On the same 14th of July, 1847, Mr. Bell also wrote to Sir George Larpent thus: —

"My dear Sir George, — In compliance with your request of the 12th instant, I have now the pleasure to enclose, first, draft of a letter from Glyn & Co; second, mine of that date to them in reply" (*i.e.*, the two letters of the 10th July); "third, mine to Messrs. Cockerell & Co. authorizing payment of 5000*l.* to Glyn & Co., such amount, together with an engagement to Glyn & Co.,

being the aggregate of your capital with Bell & Co., and as such secured, preferable to the payment of a smaller broken sum."

Mr. Bell also, on the same 14th of July, sent to Sir George Larpent a letter addressed to Cockerell & Co. in these terms:—

"Referring to a recent correspondence with your Sir George Larpent and Messrs. Glyn, Hallifax, & Co. relative to a transfer to the latter by Sir George of the capital belonging to him in the hands of my firm, I have now to request you will pay out of the funds at credit of Messrs. Bell & Co. five thousand pounds * 339 (5000*l.*) to Messrs. Glyn & Co., conformable * to said correspondence, taking their acknowledgment for the same, as also one from Sir George Larpent as a payment to him on account of his capital."

There appeared to be little doubt that, at the time when these letters were written by Mr. Bell, he was aware that the balance in favour of Bell & Co. with Cockerell, Larpent, & Co. did not amount to any thing near 5000*l.*, there being in evidence in the cause a letter from Cockerell, Larpent, & Co. to Mr. Bell, dated the 13th July, 1847, and which would be received by Mr. Bell, at Cheltenham, where he resided, on the 14th July, giving him that information, and from which it appeared that on the 30th June, 1847, to which day the account was made up, the balance in favour of Bell & Co., including outstandings, was only 1817*l.* 12*s.* 2*d.*, and the total estimated balance in favour of Bell & Co., including the estimated proceeds of goods to arrive and remaining in hand at New York, was no more than 3878*l.* 17*s.*

After the receipt of the letters sent to him by Mr. Bell on the 14th of July, 1847, Sir George Larpent, on the 19th of July, sent to Glyn & Co. his promissory note for 20,000*l.* and Mr. Bell's letters of the 14th of July to Glyn & Co. and to Cockerell, Larpent, & Co. enclosed in the following letter:—

"Enclosed I hand you my promissory note for 20,000*l.* (twenty thousand pounds), payable on the 31st of May next, to the order of Messrs. Cockerell, Larpent & Co., and indorsed by them, and as collateral security for the due payment of which I enclose two letters from Mr. W. Bell, of the firm of Bell & Co., of Canton, and

I shall be obliged by your discounting the same as verbally agreed, and placing the proceeds to the account of Messrs. Cockerell, Larpent, & Co.”

It appeared, however, that although Mr. Bell's letter to * Cockerell, Larpent, & Co. was thus sent to the plaintiffs, * 340 it was not retained by them, having been taken back by Sir George Larpent.

The plaintiffs, upon the receipt of Sir George Larpent's letter of the 19th July, 1847, and its enclosures, discounted Sir George Larpent's promissory note, and placed the proceeds to the credit of Cockerell, Larpent, & Co., as directed by Sir George Larpent. The balance in favour of Bell & Co. with Cockerell, Larpent, & Co. never became sufficient to pay the 5000*l.* though it was alleged that the Canton firm credited Cockerell & Co. with this sum as paid. Glyn & Co., on the 18th of August, 1857, wrote to Mr. William Bell a letter, simply acknowledging the receipt of his letter of the 14th of July, without saying any thing more. In the same month they applied to Cockerell & Co. for payment, and were informed that there were no sufficient funds to pay them. Glyn & Co. did not give any notice of this to Mr. Bell, or to the firm of Bell & Co. In September, 1847, Cockerell, Larpent, & Co. stopped payment, without having paid to the plaintiffs any part of the 5000*l.* Some intervening circumstances will be found referred to in the judgment of the Lord Justice TURNER, but being only referred to as corroborating the construction to be given to the above correspondence, taken by itself, it is not thought necessary to state them here. Sir George Larpent's note for 20,000*l.* was presented by the plaintiffs when it became due, but was dishonoured.

Mr. Bell died on the 1st of February, 1849. The accounts of the old firm of Bell & Co. were finally settled in the year 1853; and Sir George Larpent died on the 1st of March, 1855.

In November, 1855, the plaintiffs filed the present * bill * 341 against R. J. Hood and J. T. Kemp, as the representatives of Mr. Bell, and against Smith and Wilkinson, the surviving partners in the firm of Bell & Co., for the purpose of establishing a charge upon what remained due from Bell & Co. in respect of Sir George Larpent's share, asking also for an account of all sums received, or which, but for wilful default, might have been received by Bell & Co. in respect of Sir George Larpent's share in the old

Esdaile v. Sowerby, (a) Chitty on Bills, (b) *Legge v. Thorp*, (c) *Whitfield v. Savage*, (d) *Brown v. Maffey*, (e) *Rucker v.*

* 344 *Hiller*, (g) *Claridge v. * Dalton*. (h) Here Bell had reason to suppose the money would be paid, and the plaintiffs positively misled him by leading him to suppose the sum had been paid. All the world, except bankers, believed Cockerell & Co. to be in the highest state of solvency; the plaintiffs have lost the benefit of the order for 5000*l.* by their own delay, and should be charged with that sum. *Terry v. Parker* does not apply in this case; but *Ex parte Mure* (i) is in point. At all events, Sir George Larpent's share ought to bear its proportion of the loss occasioned by Cockerell & Co. not paying this sum.

Mr. Bacon, in reply. — There is no ground for assimilating the case of an equitable assignment of a debt to that of a bill of exchange, mercantile law not governing the former. The manifest intention of the order was not that Cockerell & Co. should pay in all events, under an obligation upon them to allow Bell & Co. to overdraw, but that they should pay when they received funds. The letter of the 24th of August, 1847, proves this. They never had funds, and the plaintiffs cannot be chargeable for wilful default. *Ex parte Mure* does not apply, for in that case there was a present right to enforce payment. There is no evidence that Bell & Co. were in any way damnified by not receiving notice that the 5000*l.* had not been paid; there is indeed an entry in the books of the firm showing that Cockerell & Co. had been credited with the 5000*l.*, but that appears to have been made after Cockerell & Co. had stopped payment.

Judgment reserved.

January 18.

* 345 *THE LORD JUSTICE KNIGHT BRUCE. — This case, which was before Sir JOHN STUART in November last, was fully argued before us in the following month. Having since reconsidered the argument and read the papers I feel no longer any doubt

(a) 11 East, 114.

(b) Page 302 (10th ed.).

(c) 12 East, 171.

(d) 2 Bos. & Pul. 277.

(e) 15 East, 216.

(g) 16 East, 43.

(h) 4 M. & Sel. 226.

(i) 2 Cox, 63.

as to the propriety of the decree made by the Vice-Chancellor in favour of the plaintiffs. The equitable mortgage on which the plaintiffs sue, its validity, and the fact that Mr. William Bell, from whom alone or jointly with others was due the debt the subject of the equitable mortgage, had express notice of it in July, 1847, the month in which it was made, were and are undisputed. The main controversy is as to the 5000*l.* mentioned in the letter of the 14th of July, 1847, from Mr. William Bell "for Bell & Co." to Messrs. Cockerell & Co., and in the letter of the same date from Mr. William Bell to the firm of Glyn & Co., represented by the plaintiffs, the dispute in that respect being not whether the firm of Glyn & Co. received that sum (for it neither appears nor is contended that Glyn & Co. received the whole or any part of it), but whether Glyn & Co., though not having received payment wholly or partially of the 5000*l.*, or any satisfaction totally or in part for it, should nevertheless be charged with the 5000*l.* in favour of the defendants representing the firm of Bell & Co.; that is to say, in extinguishment or diminution so far of the debt due to the late Sir George Larpent, which on the 10th of July, 1847, was equitably mortgaged by him to Glyn & Co. The grounds stated in the pleadings for maintaining on the defendants' part the affirmative of this proposition, which is denied by the plaintiffs, are found in the 12th, 15th, 16th, 34th, 37th, and 38th paragraphs of Mr. Kemp's answer in the cause, an answer adopted by his codefendant Mr. Smith and by the late defendant Mr. Hood.

* In my opinion these grounds partly failed the defendants * 346 in point of fact, and so far as not failing in point of fact are unavailable in law. I think it not established nor to be inferred that any such arrangement as that suggested by the 12th paragraph was made. I think also that the analogy, if any, between what has been termed the "order" for the 5000*l.* in favour of Glyn & Co., and either a check on a banker or a bill of exchange, is imperfect, is slight and distant, and does not assist the defendants, and that the present case is not brought within the rule or principle on which that reported by Mr. Cox, which was mentioned during the argument (*Ex parte Mure*), was decided. The evidence seems to me to show clearly that Glyn & Co. were unable to obtain, that they could not at any time have obtained, the 5000*l.* from Sir George Larpent, or from Cockerell & Co., and were not according to the terms of the documents of July, 1847, or any of

them, or otherwise, bound to proceed against Cockerell & Co., or Sir George Larpent, or to give any notice to Mr. Bell, Mr. Smith, and Mr. Wilkinson, or any of them, of the non-payment of that sum; and I do not consider it established or to be inferred that they or any of them did or abstained from doing any act in the faith or belief, or believed in fact at any time, that the 5000*l.*, or any portion of that sum, had been paid or satisfied to Glyn & Co., or become the subject of any arrangement or agreement between them and Sir George Larpent, or between them and the house of Cockerell & Co., not appearing on the face of the documents which form or are parts of the common case of the plaintiffs and defendants, nor in my judgment is there any, the least, reason for supposing that any such arrangement or agreement existed. It appears to me that the decree is upon the pleadings, evidence, and admissions right as to the 5000*l.*, and if so, then plainly right as to the interest on that sum.

* 847 * The answer alone is decisive as to the interest. At one time I doubted whether in any event some accounts or account might not be necessary to be directed. Upon examination, however, of the evidence and admissions, I am of opinion that none is requisite, and if any would but for the course taken at the hearing before the Vice-Chancellor by the counsel for the defendants have been requisite, that course (in my opinion a proper course) has excluded them from demanding an account. The suggestion made at the bar that the defendants by way of set-off or otherwise are entitled to some benefit or allowance in diminution at least of the charge of 5000*l.* by reason of Sir George Larpent's conduct, or because he was throughout the transactions in question, and at the time of the failure in September, 1847, of the house of Cockerell & Co., a partner in that house, is, I think, without foundation; especially as Mr. Bell had notice on or before the 14th of July in that year of the plaintiffs' equitable mortgage. Observations were with some plausibility made upon the lateness of the institution of the suit, the bill not having been filed before the year 1855, nor before the death of Sir George Larpent, who survived Mr. Bell. There is, however, neither statutory bar nor, as I conceive, any ground of presumption in favour of the defendants, who seem not to have lost any material evidence, and the delay in my opinion furnishes them with no defence. The appeal

I think fails altogether, and should be dismissed accordingly, the appellants paying the costs of it.

The Lord Justice TURNER, after stating the facts of the case as above, down to the placing the proceeds of Sir George Larpent's promissory note to the credit of Cockerell, Larpent, & Co., proceeded as follows :—

It will be convenient here to consider how the case * stands * 348 upon these facts, adding merely that on the 27th of September, 1847, Cockerell, Larpent, & Co. stopped payment, and that no part of the 5000*l.* which was to be paid to the plaintiffs had then been paid to them. The defendants by whom this appeal has been presented, have contended that the plaintiffs are nevertheless chargeable with this sum of 5000*l.*, insisting that it was by their default only that it was not received, and that the same obligation of diligence attached upon them as would have attached upon the holder of a bill of exchange or promissory note. It does not seem to me, however, that the obligations which attach upon the holders of bills of exchange and promissory notes have any thing to do with this case. This is not the case of a bill of exchange or promissory note, but of an assignment of a debt. In bills of exchange and promissory notes the time for payment is fixed, and there is no particular fund out of which the payment is to be made. Here there is no time for payment fixed, but there is a fund for payment. Bills of exchange and promissory notes are governed by the mercantile law. Assignments of debts are not, as I conceive, so governed. In the cases of bills of exchange and promissory notes the question is of the discharge of third persons, not of the acceptor or maker; here the question is of the discharge of the fund itself. *Ex parte Mure* (a) which was referred to in the course of the argument, does not seem to me to govern this case. In that case there was an undoubted right to recover on the bond assigned, and there was forbearance to sue upon the bond at the instance of the debtor. Lord THURLOW in that case, although in the course of his judgment he refers to the case of bills and notes, certainly did not decide the case upon the ground that the assignee of a debt is in the same position as the holder of a bill or note. He says that the * assignee must use ordinary diligence, and decides upon * 349

the ground that there had been gross negligence. The case I think goes no further than that the assignee of the debt is chargeable for wilful default as every mortgagee of course must be. I think therefore that this part of the argument may be laid out of the case, and that the true question is simply this, whether there has been any such default on the part of Glyn & Co. as to render them liable to be charged with this sum of 5000*l.* as if they had received it.

In determining this question, the first point to be considered seems to me to be, whether the plaintiffs could have enforced payment of this sum. If not, they cannot, as I apprehend, be charged with it. Now the letter to Cockerell, Larpent, & Co. of the 14th of July requests the payment to be made out of the funds at credit of Bell & Co., and the letter to the plaintiffs of the same date, interpreting, as it appears, the letter to Cockerell, Larpent, & Co., says that the payment is to be made out of the surplus partnership assets of Bell & Co. in the hands of Cockerell, Larpent, & Co. Both the letters, therefore, treat the payment as being to be made out of funds of Bell & Co. (meaning, as I assume, the new firm); in the one letter it is said at their credit with, in the other in the hands of Cockerell, Larpent, & Co., but both these expressions mean, as I think, the same thing, although, if there be any doubt upon this point, the latter as being contained in the interpreting letter, must I think prevail. At this time, however, Mr. Bell knew, as appears from the letter of the 13th of July, that there were not funds of Bell & Co. in the hands of Cockerell, Larpent, & Co., to the amount of 5000*l.*, and he could not therefore mean that the payment should be made out of funds then in hand. I can under-

stand him therefore only to have meant that it should be
 * 350 made out of such * funds when they should come to hand;

but the evidence shows that funds to a sufficient amount to meet the payment never did come to hand. It was attempted on the part of the defendants to meet this difficulty, by suggesting that the 5000*l.* was intended to be provided out of the moneys which Bell & Co. were authorized to overdraw from Cockerell, Larpent, & Co.; but it would, I think, be contrary both to the words of the letters and to the intention of the parties to adopt this view, for the words of the letters refer to a fund actually at the credit of Bell & Co., with or in the hands of Cockerell, Larpent, & Co.; and if it had been intended by Mr. Bell that the 5000*l.* should be paid

out of the moneys which Bell & Co. had the right to overdraw, there seems to be no reason why he should not at once have drawn in favour of Sir George Larpent, or at all events in favour of the plaintiffs. He must have known from the letters of the 10th and 12th of July, that Sir George Larpent's object was to raise 20,000*l.* for the benefit of Cockerell, Larpent, & Co., and his wish was that that object should be carried out as expressed in his letter to Sir George Larpent of the 14th of July. How then can we impute to him the intention that the 5000*l.*, or any part of it, was to be immediately repaid to the plaintiffs out of the funds of Cockerell, Larpent, & Co. Besides, Mr. Bell had before him the original statement of Sir George Larpent in his letter to the plaintiffs of the 10th of July, in which he stated that he had been informed by Mr. Bell that a portion of the balance at credit with Cockerell, Larpent, & Co., on account of Bell & Co., say about 4000*l.* to 5000*l.*, would be appropriated towards payment of the 25,000*l.*, Sir George Larpent's assumed share in the assets of Bell & Co.; but Mr. Bell, in his letter to Sir George Larpent of the 14th of July, says he prefers the payment of the 5000*l.* to the payment of the smaller broken sum, thus showing, as it seems to me, * that * 351 he did not mean to deal with that broken sum, with which he must have dealt if he had drawn on the general credit which Bell & Co. had with Cockerell, Larpent, & Co. for 25,000*l.* Looking at the case, therefore, as it stands upon the facts already stated, I think that the plaintiffs had no right to demand the payment of the 5000*l.* by Cockerell, Larpent, & Co., and cannot therefore be charged with it.

What subsequently passed seems to me to confirm this view of the case. Mr. Bell, in his letter to the plaintiffs of the 14th of July, had desired that on receipt of the 5000*l.* they would grant him an acknowledgment; and in his letter to Cockerell, Larpent, & Co. of the same date, he had desired them, when they paid the 5000*l.* to take an acknowledgment both from the plaintiffs and from Sir George Larpent. On the 12th of August, Sir George Larpent sends him an acknowledgment of his letters of the 14th of July to the plaintiffs, and to Cockerell, Larpent, & Co., having been received by him (Sir George Larpent). He is not satisfied, and on the 13th of August, 1847, writes to Sir George Larpent for the plaintiffs' letter to him of the 10th July (which would be his authority for making payment to the plaintiffs, and which he had

returned to Sir George Larpent in his letter of the 14th of July), and for the plaintiffs' acknowledgment of his letter to them of the 14th of July; and on receiving these documents from Sir George Larpent, he writes on the 20th of August that they are quite satisfactory, without, in any way, adverting either to the plaintiffs or to Sir George Larpent's receipt for the 5000*l.* Again, in October and December, 1847, payments are made to the plaintiffs by remittances from China, through the medium of Mr. Bell, and still there is no request for, and no reference to, the receipts for the 5000*l.*

* 352 * It was said for the defendants that Mr. Bell went on in the belief that the 5000*l.* had been paid, and that notice ought to have been given to him that the payment had not been made, and he would then have stopped the consignments coming from China to Cockerell, Larpent, & Co., and thus it was said that the firm of Bell & Co. were damnified by the notice not having been given; but Mr. Bell had the means of knowing, and must, I think, be assumed to have known, the state of the accounts between his own firm and Cockerell, Larpent, & Co., and whether the 5000*l.* had been paid or not. And, independently of this consideration, the whole weight of this part of the argument depends, as it seems to me, upon the previous question, when the 5000*l.* was to be paid; for if, as for the reasons already given, I think was the case, it was to be paid only when there were funds in hand to pay it, the time for giving notice never arrived. It could not surely be said that it was incumbent on the plaintiffs to inform Mr. Bell from day to day what was the state of the accounts between his firm and Cockerell, Larpent, & Co. It was attempted on the part of the defendants to strengthen this part of their argument, by referring to a credit said to have been given to Cockerell, Larpent, & Co. for the sum of 5000*l.* by this firm of Bell & Co. at Canton, immediately upon the receipt by them of the correspondence which had passed in this country between Sir George Larpent, the plaintiffs, and Mr. Bell, and which correspondence was sent to the Canton firm by Sir George Larpent on the 24th of August, 1847; but even if we give full faith to the *bona fides* of the alleged entry of this credit of 5000*l.*, which, however, I doubt exceedingly, it does not appear to me to affect the case. Bell & Co. could not by such an entry affect the rights of the plaintiffs, and the correspondence which had passed having been before the Canton firm at the time

when the credit is alleged * to have been given, they had * 353 full means of judging of its effect as to the period when the 5000*l.* was to be paid.

Another argument which was pressed for the defendants on this part of the case was, the delay in bringing forward the claim. Mr. Bell died on the first of February, 1849, Sir George Larpent on the 1st of March, 1855, and this bill was not filed till the month of November, 1855; but it is clear that there is no statutory bar, and it appears that the plaintiffs asserted this claim in an action which was brought by them in the year 1848, and was stopped by the death of Mr. Bell; and it further appears that the accounts of what was coming in respect of Sir George Larpent's share were not brought to a close till the year 1853, and under these circumstances I cannot see my way to hold that the plaintiffs can be barred of relief upon the ground of delay, more especially as the case, in my opinion, depends mainly, if not wholly, on the correspondence, so that there is no reason to suppose any loss of evidence; and still more, as the defendants might themselves, as I apprehend, have filed a bill to have the account taken upon the footing for which they have contended. It is upon these grounds I agree with the Vice-Chancellor in opinion that the plaintiffs ought not to be charged with this sum of 5000*l.*; and I may add, that I think that in any view of the case it would have been difficult so to charge the plaintiffs, standing as they do in the position of mortgagees, who were told, as it appears, that there were no funds to meet this payment.

Some minor points were raised on the part of the defendants. It was said that an account ought to have been directed to ascertain what was due in respect of Sir George Larpent's share in the partnership of Bell & Co., * but the balance which * 354 was due, independently of the question as to the 5000*l.*, having been clearly admitted, I think there was no occasion to direct the account. It was said that the balance would be affected by the 5000*l.* not being treated as being paid to Sir George Larpent; that there would be a loss by the 5000*l.* becoming a debt due from Cockerell, Larpent, & Co.; and that Sir George Larpent's share ought to bear its proportion of that loss. But the loss thus arising must I think be attributable to the dealings of the new firm of Bell & Co. with Cockerell, Larpent, & Co., and would not affect Sir George Larpent's share in the old firm, more especially as

against the plaintiffs, the assignees of that share. The decree was also objected to upon the ground of interest being given in favour of the plaintiffs, but this I understand to have been according to the course of the account between Bell & Co. and Sir George Larpent, and if so it is correct. The decree therefore appears to me to be right in all points, and the appeal must be dismissed, and I think with costs.

1860. January 12, 19. Before the Lord Chancellor Lord CAMPBELL.

A testator gave all his real and personal estate to his wife for life, and after her decease to his son absolutely, chargeable with the payment of a legacy of 200*l.* to the testator's daughter, within six months after his decease, and with the payment of the testator's debts and funeral and testamentary expenses. There was no personal estate: *Held*, that the legacy was charged on the life-interest as well as on the remainder of the real estate, and ought, with the arrears of interest for six years, to be raised by mortgage of the property, and that the remainder-man ought to be recouped out of the rents and profits to the full amount of the arrears of interest raised out of the estate.

THIS was the appeal of the plaintiff from the decree of Vice-Chancellor STUART, declaring that a legacy of 200*l.* bequeathed by the will of the testator in the cause, and charged on his real and personal estate, was not payable until the reversion of the testator's real estate fell into possession, and that it was consequently not to be raised until the death of a tenant for life.

The facts of the case, and the arguments are fully stated in the Lord Chancellor's judgment.

Mr. W. Forster, for the plaintiff and appellant, the infant reversioner, cited *Hawkins v. Hawkins*. (a)

Mr. Karlake, for the tenant for life, referred to Seton on Decrees. (b)

Mr. Malins and *Mr. Prendergast* appeared for other parties.

(a) 6 L. J. Rep. (N. S.) Ch. 69. (b) 2d ed. p. 137, No. 8.
[272.]

Mr. Forster, in reply, cited *Waring v. Coventry*. (a)

Judgment reserved.

January 19.

* THE LORD CHANCELLOR. — The will of John Makings, to * 356
be construed in this case, is in the words following :—

“ I give and devise my real estate whatsoever and wheresoever, and also all and singular my personal estate and effects of what nature or kind whatsoever, unto my wife Elizabeth Makings, for and during her natural life without impeachment of waste, and from and after her decease I give and devise my said real and personal estate to my son John Makings, his heirs, executors, administrators, and assigns for ever, subject nevertheless to and chargeable with the payment of the sum of 200*l.* to my daughter Sarah within six calendar months after my decease, and also subject to the payment of my just debts and funeral and testamentary expenses.”

The testator died in 1840, having no personal property of any value, but having land of which he was seised in fee-simple producing 32*l.* a year rent, which has since been received by his widow. John the son died in 1851, intestate, leaving the plaintiff, his son and heir-at-law, now of the age of fifteen years.

The daughter Sarah has never received the legacy of 200*l.* or any interest upon it.

The question before the Vice-Chancellor was, whether the legacy of 200*l.* was charged on the life-estate as well as on the reversion, or on the reversion only.

The decree appealed against declared, “ That the legacy of 200*l.* bequeathed by the said testator to his daughter Sarah is chargeable on the reversion of the real estate devised by the said testator, and that the said legacy is not payable until the reversion falls into possession, * and that it is not to be raised until * 357
the death of the tenant for life of the said real estate.”

I am of opinion that this declaration is erroneous, and that the life-estate in the land was given subject to the charge of the legacy of 200*l.* as well as the testator’s debts and funeral and testamentary expenses. Although these charges are created after the

devise of the reversion, it seems to me that, even literally and grammatically, the life-estate was taken as well as the reversion subject to these charges. There seems a great difficulty in coming to the conclusion that a legacy directed to be paid within six months after the death of the testator shall not be raised till after the death of the tenant for life, who, after a lapse of twenty years, is still alive. Then the legacy is charged on the real estate in the same manner as the testator's debts and funeral and testamentary expenses, and it can hardly be supposed that he intended to defer such payment indefinitely till the death of his widow.

It therefore appears to me that the legatee is entitled to have the legacy raised forthwith by mortgage of the land charged with it; and the only question is, whether the arrears of interest due on the legacy from six years before the filing of the bill ought to be included in the mortgage? The counsel for the infant reversioner contends that, as the tenant for life has been allowed by the legatee to be in the receipt of the rents and profits since the death of the testator, the remedy of the legatee for these arrears is only against the tenant for life.

But the legacy being a charge upon the life-estate as well as upon the reversion, the legatee was entitled to have it raised by mortgage six months after the death of the testator, and if such a mortgage had been executed, and if for six years before the
* 358 filing of the bill no interest * had been paid, in a foreclosure suit the mortgagee would have been entitled to insist on payment not only of the principal but also of the arrears of interest; and the remainder-man could not have redeemed without paying the arrears of interest as well as the principal. But, in this Court, are not the three parties, the legatee, the tenant for life, and the remainder-man, to be considered in the same situation as if a legal mortgage had actually been executed?

On behalf of the remainder-man, chief reliance was placed on the alleged laches of the legatee in not claiming these arrears out of the estate in the hands of the tenant for life. But, in *Loftus v. Swift*, (a) Lord REDESDALE held that the mere laches of a mortgagee in not demanding interest from the tenant for life from 1755 to 1802 was not a sufficient bar to his claim for the arrears as against the remainder-man, there being nothing to show connivance or collusion between him and the tenant for life, and the

(a) 2 Sch. & Lef. 642.

same rule was followed by Lord St. LEONARDS, when Chancellor of Ireland, in *Wrizon v. Vize*. (a) Where there is a charge upon the inheritance the remainder-man may file a bill to compel the tenant for life to keep down the interest as far as the rents and profits of the estate will go, and in this case these rents and profits considerably exceeded the interest on the legacy. The present plaintiff, the remainder-man, is an infant; but the bill might have been filed by his father, under whom he claims. The case of *Hawkins v. Hawkins*, (b) much commented upon during the argument, seems to me to have no bearing upon this question, at least as far as the rights of the legatee are concerned. There the contest arose between the tenant for life and the remainder-man, the legatee taking no part in the discussion.

* But in the present case, as between the plaintiff, the * 359 remainder-man, and his grandmother the tenant for life, he has a clear right to be recouped to the full amount of the arrears of interest to be raised out of his inheritance. It is settled law that tenant for life of an equity of redemption is bound to keep down the interest accruing during his tenancy; ¹ and *Waring v. Coventry* (c) shows that the full amount of such arrears will be a charge upon future rents and profits payable during the tenancy for life.

Upon the whole I think that the Court must declare that the legacy is charged on the life-estate as well as on the reversion, and that the legacy is raisable forthwith, together with interest, from six years next before the filing of the bill. The decree will be, that the legacy and interest be raised and paid accordingly, together with the costs of all parties, to be taxed as between solicitor and client; with a direction, as prayed in the alternative clause of the prayer of the bill, viz., that the plaintiff, the remainder-man, be recouped out of future rents and profits of the tenant for life to the full amount of the arrears of interest, to be raised out of the estate.

It was proposed by *Mr. Forster*, on behalf of the plaintiff, that the tenant for life be ordered to keep down the interest on the mortgage out of the future rents and profits of the estate; but this is quite unnecessary, as there is a clear obligation to do so.

(a) 2 Dru. & War. 192.

(c) 2 Myl. & K. 406.

(b) 6 L. J. (N. S.) Ch. 69.

¹ See 1 Story Eq. Jur. § 488.

1860. January 23. Before the LORDS JUSTICES.

The plaintiff accepted a bill for the accommodation of R. R. afterwards compounded with his creditors, who executed a release in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and R., that his rights against the plaintiff should not be prejudiced. R. died, appointing the plaintiff his executor. The plaintiff, at the request of R.'s widow, renounced probate, and allowed the widow to take out administration, in consideration of which Mrs. R. and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R. on several instruments and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him, and filed his bill against Mrs. R. and her brother for indemnity out of the assets.

Held, that however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating the plaintiff's payment to the bill holder as voluntary, and not made in satisfaction of a legal liability, and that she had therefore no defence to the suit; and that although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand which as against his principal was the proper subject of a suit in equity, he was properly made a party to the suit.

THIS was an appeal by the defendants from a decree of the Duchy Court of Lancaster.

In July, 1853, the plaintiff accepted an accommodation bill for 400*l.*, drawn upon him by Thomas Horrobin Revell, who was then carrying on business as a cooper. This bill was discounted by George Hay Anderson, who it appeared was aware, when he discounted it, that it was an accommodation bill.

After this, Revell fell into difficulties, and, on the 20th of July, 1854, executed a composition deed, in which the plaintiff joined as his surety. By this deed the creditors, parties thereto, agreed to accept, in satisfaction of their debts, the sum of 10*s.* in the pound, by the following instalments: viz., 5*s.* before the execution of the deed, 2*s.* 6*d.* upon its execution, and 2*s.* 6*d.* on 1st February, 1855; and in consideration of the two instalments of 5*s.* and 2*s.* 6*d.* so paid, and of the covenant thereafter contained by Revell and the plaintiff for payment of the third instalment, they released Revell from the debts due to them, the operative

* 361 * part being framed in the widest terms, without any reser-

vation. Revell and the plaintiff jointly and severally covenanted for payment of the remaining 2s. 6d. in the pound.

This deed was executed on behalf of Anderson, the holder of the bill for 400*l.*, by a Mr. Batey, who acted by his authority, but held no power of attorney from him. Anderson acceded to the deed, on the understanding between himself, Revell, and the plaintiff, that his rights against the plaintiff under the bill should not be prejudiced. This understanding was not made known to any of the other creditors.

To indemnify the plaintiff against his liability as surety under the composition deed, Revell deposited with him a policy of insurance on Revell's own life, and an agreement under which a sum of 100*l.* was coming to Revell from a Mr. Hine.

Revell died on 7th August, 1855, leaving a will, by which he appointed the plaintiff and T. F. Ashe his executors. His widow, the defendant Anne Revell, being desirous of becoming his personal representative, asked the executors to renounce. The plaintiff expressed his willingness to do so if Mrs. Revell would give him an authority to receive from Mr. Hine the 100*l.*, and would also procure a responsible person to join as surety with her in indemnifying the plaintiff against the liabilities under which he had come on behalf of Revell.

On 12th December, 1855, Mrs. Revell gave to the plaintiff the following agreement:—

“To Mr. George Atkins.

“Sir,—In consideration of your (at my request) renouncing * the office of executor of my late husband Thomas * 362 Horrobin Revell, deceased, in order that I may become administratrix with the will annexed, I consent that you shall receive, and (so far as authority from me as legal personal representative of the said T. H. Revell is required) I authorize you to receive, of Mr. Robert Hine the sum of 100*l.*, which is payable pursuant to an agreement between the deceased and him, dated 7th July, 1855, and you may retain thereout the debt due to you from the deceased, and apply any balance in satisfying the liabilities you are under on behalf of the deceased, and what other (*sic*) the subject of the annexed engagement of this date. Dated this 12th December, 1855.

“ANNE REVELL.”

[277]

Mrs. Revell, and her brother Robert Douglas, at the same time gave to the plaintiff the following memorandum : —

“ Mr. George Atkins.

“ Sir, — In consideration of your (at our request) renouncing the office of executor of the will of the late Mr. T. H. Revell, we and each of us do undertake and promise to indemnify and save you harmless from all costs, losses, damages, and expenses by reason of your liability as surety for the said T. H. Revell to [here followed particulars of several liabilities] and upon your acceptance of the draft of the said T. H. Revell (for his accommodation) for 400*l.*, which became due on or about the 28th of November, 1853. But our liability under this engagement is not to subject us to the payment of any greater amount than the assets of the deceased which shall be received by his legal personal representative. Dated this 12th day of December, 1855.

“ ANNE REVELL.

“ ROBERT DOUGLAS.”

* 363 * The plaintiff and Ashe thereupon renounced the executorship ; letters of administration, with the will annexed, were granted to Mrs. Revell, and the plaintiff gave up to her the policy of insurance, that she might receive the amount due upon it.

Some time after this, Anderson pressed the plaintiff for payment of the money remaining due on the bill of exchange ; and the plaintiff, after some correspondence with Mrs. Revell, during which it did not appear that she ever suggested that Anderson had no right to compel payment, paid the amount ; and, being unable to obtain reimbursement from Mrs. Revell, filed the present bill against Mrs. Revell and Douglas, praying that the agreements of the 12th of December, 1855, might be specifically performed ; that an account might be taken of all the debts mentioned in the said agreement, for which the plaintiff was a surety for the testator ; an account of the moneys paid by the plaintiff in respect of them ; an account (if necessary) of assets received by Mrs. Revell ; and that the defendants might be decreed to pay the debts mentioned in the said agreement of December, 1855, and to reimburse the plaintiff what he had paid to Anderson.

The Vice-Chancellor made a decree directing an account of what, if any thing, had been paid by and was due to the plaintiff

in respect of the debts and liabilities mentioned in the second agreement of 12th December, 1855, having regard to what, if any thing, was received by the plaintiff under a deed of 20th March, 1854, mentioned in the answer of the defendants; an account of all moneys, if any, received by the plaintiff under the first agreement of 12th December, 1855; and an account of the personal estate of the testator received by Mrs. Revell. The defendants appealed.

* *Mr. Little*, in support of the decree. — We have a clear * 364 right to a decree, even if we are wrong as to the money paid to Anderson, for that is a mere item in an account. But it is wished to have the opinion of the Court on that, as it is really the substantial matter in dispute. The composition deed did not at law release Anderson's debt, for it was only executed by an agent not shown to have been authorized by deed; it therefore operated only as an agreement. This makes the whole matter a question of equity. Now Batey signed under an express agreement with the surety, that his liability to the creditors should not be altered; the surety, therefore, could not set up the deed as a release. *Wyke v. Rogers*, (a) *Ex parte Harvey*. (b) The plaintiff, therefore, was liable to Anderson at the time when the agreements of December, 1855, were entered into. Again, those agreements treat us as being liable in respect of this bill of exchange, and the defendants had notice before we paid Anderson, but they never raised the question of our payment to him being voluntary till after we had paid him. The objection, therefore, comes too late. It is urged that we ought to have proceeded at law, not here; but how could we usefully proceed at law to recover a demand limited to the amount of Revell's assets?

Mr. Malins and *Mr. North*, for the appellants. — It is not alleged that there is any liability, except in respect of Anderson's debt. The plaintiff's case, therefore, must stand or fall by that. Now Anderson, when he discounted the bill, knew that the plaintiff was a surety only. That being so, the release in the composition deed by releasing the principal debtor without any * reserva- * 365 tion of the remedy against the surety, released the plaintiff, whose subsequent payment to Anderson was therefore voluntary. It is said that there was an agreement that the liability of the

(a) 1 De G., M. & G. 408.

(b) 4 De G., M. & G. 881.

surety should be kept alive ; but such an agreement was illegal as a fraud upon the body of creditors who executed the deed. This makes *Wyke v. Rogers* inapplicable, as no such point arose there. *Ex parte Glendinning*, (a) and *Lewis v. Jones*, (b) show that such a secret reservation is wholly void, and are almost on all fours with this case. At the time, then, of the agreements of December, 1855, the plaintiff was under no liability to Anderson ; he might consider himself under a moral liability, but that, in the absence of legal liability, does not prevent a payment from being voluntary. *Lake v. Brutton*. (c) The agreements of December, 1855, were not intended to create a liability to indemnify the plaintiff against any thing to which he was not in law liable. Those agreements were substituted for any demand the plaintiff might have against the testator's assets : they create a mere liability to pay money, in respect of which liability there is no right to come here, there really being nothing of the nature of specific performance in the case. *Antrobus v. Davidson*. (d)

King v. Malcott, (e) *Cowper v. Green*, (g) *Price v. Barker*, (h) *Ex parte Giffard*, (i) *Kearsley v. Cole*, (k) and *Webb v. Hewitt*, (l) were also referred to.

* 366 * THE LORD JUSTICE KNIGHT BRUCE.—This is a case which it is proper to consider under two aspects : the one inclusive, the other exclusive, of Mr. Douglas, one of the defendants. Considering it, in the first place, under the latter view, I conceive that, on the pleadings and evidence, the plaintiff has clearly established himself to be a creditor of the testator, Mr. Revell, sufficiently for the purpose of obtaining the ordinary decree against Mr. Revell's assets ; has sufficiently proved himself to have been a surety for Mr. Revell, and to have paid money which ought to be repaid out of the estate ; and a decree against the assets accordingly is within the scope of the bill, though other matters also are contained in it. It is said that this title is excluded, and all right

(a) Buck, 517.

(b) 4 B. & C. 506. See 2 Beav. 395, n.

(c) 18 Beav. 34.

(d) 3 Meriv. 569.

(e) 9 Hare, 692.

(g) 7 M. & W. 633.

(h) 4 E. & B. 760.

(i) 6 Ves. 805.

(k) 16 M. & W. 128.

(l) 3 K. & J. 438.

to sue in equity taken away, by the two agreements of December, 1855. That is not my opinion. Those agreements, in my judgment, only modify the plaintiff's right, and leave him a title to sue in equity against the assets; giving him, also, a right against the representative personally. Therefore, as between the plaintiff and the personal representative there is a right, not necessarily and of course, to have, in the first place, the ordinary relief to which he would be entitled in the absence of the agreements, but to obtain relief modified by those agreements; and the decree so treats the case. The rights which the plaintiff has, independently of the bill for 400*l.*, are enough to support the decree as it stands; but as the parties, without prejudice to their right of appeal, wish for our opinion as to the bill, we have no objection to giving it. I need not say what I should have thought of the case as to that bill, but for the agreements of December, 1855. I am of opinion that those agreements are effectual to preclude and do * pre- * 367 clude the defendant, the personal representative, from alleging that the payment made by the plaintiff to Anderson, in respect of the 400*l.* bill, was not made under an enforceable obligation, but was made only under a moral obligation, or voluntarily. I think that they amount to an acknowledgment that the plaintiff was under enforceable liabilities as a surety for the testator. As between the plaintiff and the personal representative, the decree, in my judgment, was a matter of course. It is said, however, that Mr. Douglas is only concerned in the matter as a surety, and that there is no equitable case as against him. But he has joined with the personal representative in an agreement which has modified the plaintiff's title to relief in equity; and though he may by the second agreement have made himself liable severally, he has associated himself with a demand which is the proper subject of an account here. He has an interest in checking that account, and having become surety in respect of a demand to which the personal representative is liable in equity, he cannot complain of being made a party to a suit in equity respecting it. I have seldom met with a contested decree against which so little could be said. The appeal must be dismissed, with costs.

THE LORD JUSTICE TURNER.—I entirely agree with the conclusion at which my learned brother has arrived, and for the same reasons.

1860. January 24. Before the LORDS JUSTICES.

New trustees had been appointed under a power in a settlement, but no assignment or transfer had been made to them of the trust fund, which consisted of moneys paid into Court in a suit. *Held*, on a motion for decree in a suit for the execution of the trusts of the settlement, that the new trustees ought to have been made defendants, and an objection for want of parties having been taken by affidavit, no answer having been required to the bill: ¹ *Held*, that the plaintiff had been properly ordered to pay the costs of the day.*

THIS was the appeal of the plaintiff from an order made by Vice-Chancellor STUART on a motion for decree, whereby he directed the motion to stand over, with liberty to the plaintiff to amend his bill by adding parties and otherwise in relation thereto, and that the plaintiff should pay to the defendants (except the defendant Charles Lee) 10*l.* for the costs of the day.

The following were the facts of the case:—

By a post-nuptial settlement dated 6th March, 1829, all the interest of Georgiana Spencer Seaman, under the will of Francis Norton, then deceased, was assigned to John Smith and J. S. Morse, their executors, administrators, and assigns, upon trust for Georgiana Spencer Seaman for her life, to her separate use, with remainder to her husband John Seaman and his assigns during his life, and after the decease of the survivor of them upon trust for their children, the shares of such children to be vested at twenty-one in the case of a son, and at twenty-one or marriage in the case of a daughter, with limitations over in events which did not happen. The settlement contained a power to John Seaman to appoint new trustees.

On the 20th of November, 1830, John Seaman became bankrupt, and Charles Lee was appointed the official assignee of his estate and effects.

On the 31st of December, 1835, Mr. and Mrs. Seaman
* 369 assigned by deed all their interest under the will of * Francis Norton, together with other property, to P. St. Quentin and George William Dyer, for the benefit of the creditors of John

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 205, 206.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 976.

Seaman who should sign the deed, with a direction that the surplus (if any) left, after providing for the trusts of the deed, should be held upon the trust of the settlement of the 6th of March, 1829.

In 1851, Georgiana Isabella Spencer Seaman, the only child of Mr. and Mrs. Seaman, attained twenty-one.

By an indenture dated the 17th of January, 1852, made between Georgiana Isabella Spencer Seaman of the first part, Georgiana Spencer Seaman of the second part, William Lowless of the third part, and Thomas James Nelson of the fourth part, the parties thereto of the first and second parts assigned to Thomas James Nelson by way of mortgage (among other things) all their interest under the will of Francis Norton, and the settlement of 6th of March, 1829, to secure the repayment of certain advances then made, and of further advances which might thereafter be made, by William Lowless to or by the direction of Georgiana Isabella Spencer Seaman, with interest.

A suit of *Fisk v. Norton* had been instituted for the administration of the estate of the testator Francis Norton, and by the chief clerk's certificate in this and some supplemental suits, it was certified that the clear residue of the estate of the testator was divisible into eight equal shares; that Georgiana Spencer Seaman was beneficially interested in one of such shares, subject to an incumbrance in favour of Peter Day; and that, subject to such incumbrance, her share was vested in H. E. Rackham, J. H. Rackham, and Henry Cooke, who were the legal personal representatives of the last survivor of the trustees of the indenture of March 6th, 1829.

* The present suit was instituted by Thomas James Nelson, * 370 son, for an account of the trust funds vested in H. E. Rackham, T. H. Rackham, and Henry Cooke, or which might in any manner be vested in them upon or subject to the trusts of the indenture of the 6th March, 1829: and the bill also prayed that the same, when ascertained, might be carried over to the credit of the present cause, subject and without prejudice to the claim of Peter Day; and that new trustees of the indenture of the 6th March, 1829, might be appointed, and the trusts of it carried into effect under the direction of the Court.

The bill stated that the moneys in Court in the suit of *Fisk v. Norton*, to the credit of the share of Georgiana S. Seaman, were more than sufficient to satisfy the incumbrance of Peter Day, and

that the right to the surplus was in H. E. Rackham, T. H. Rackham, and Henry Cooke, as the personal representatives of the last survivor of the trustees of the settlement of the 6th March, 1829.

The only defendants to the bill were, John Seaman and Georgiana Spencer Seaman his wife, Georgiana Spencer Isabella Seaman, Charles Lee, H. E. Rackham, T. H. Rackham, and Henry Cooke, and George Arthur Dye, who was the surviving trustee of the indenture of the 31st December, 1835.

No answer was required to the bill, and notice of motion for a decree having been given, the defendant John Seaman, in July, 1859, filed an affidavit, stating that he had, by deed-poll dated the 16th June, 1858, exercised the power given to him in the indenture of the 6th March, 1829, by appointing two persons named Goatley and Tress to be trustees in the place of the deceased trustees * 371 of the indenture, and submitting whether * the trustees so appointed should not be parties to the record.

On the 8th of December, 1859, the cause came on to be heard upon motion for decree, when it was objected on the part of the defendant John Seaman that the new trustees ought to have been made parties. It was admitted on his part that the appointment of new trustees was unknown to the plaintiff, and had not been communicated to him till after the institution of the suit, and that the trust fund had not been assigned to Messrs. Goatley & Tress, but still continued in Court in the cause of *Fisk v. Norton*.

The Vice-Chancellor, after hearing counsel against the objection, made the order appealed from.

Mr. A. E. Miller, in support of the appeal. — The executors of the survivor of the trustees of the settlement, in whom the legal estate in the fund in question is vested, are parties to the record, and all the persons beneficially interested under the settlement are also parties; for it is not probable, considering the age of Mrs. Seaman, that other children of the marriage will be born. Under these circumstances, the trustees recently appointed by Mr. Seaman, and who, as no assignment has been made to them, have only an equitable interest in the fund, are not necessary parties to the suit. *Head v. Lord Teynham*, (a) *Malone v. Gerachty*, (b) *Calvert on Parties*. (c) The power given to Mr. Seaman to appoint new trustees is not a power in gross, as he takes a rever-

(a) 1 Cox, 57.

(b) 3 Dr. & War. 262.

(c) Page 288.

sionary life-interest under the settlement. It is, therefore, very questionable whether the exercise by him of the power after his bankruptcy is valid. The objection for want of parties is not taken on * the record, but by affidavit. The defendant, * 372 therefore, even if the new trustees should be held to be necessary parties to the record, ought to pay their costs incurred in taking the objection.

[THE LORD JUSTICE TURNER. — The bill prays for the appointment of new trustees of the fund, and yet the actual trustees are not before the Court.]

The plaintiff is willing to waive that part of the relief prayed for.

Mr. Archibald Smith, for the defendants the Seamen; *Mr. Charles Hall*, for the defendant A Dyer; and *Mr. Haynes*, for the two Rackahms and Cooke, asked for the costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE. — The order under appeal is, in my opinion, correct, and the bill must be amended. The plaintiff should, I think, have been satisfied with one decision upon such a point.

THE LORD JUSTICE TURNER. — I concur in the opinion that the new trustees are necessary parties to the suit. In *Head v. Lord Teynham*, (a) original trustees of the will, in whom the legal estate was vested, were before the Court; but in the present case we are called upon to execute the trusts of a settlement when the trustees of that settlement are not before us. The objection was taken by Mr. Seaman by affidavit, the plaintiff not requiring an answer from him. That affidavit was filed in July, and the cause was heard in December. The objection, therefore, cannot be said to have come by surprise upon the plaintiff. The appeal must be dismissed, and dismissed with costs.

(a) 1 Cox, 57.

1860. January 18, 20, 25. Before the LORDS JUSTICES.

S. & Co. were owners of seven-eighths of an American vessel, and ship's husbands. T. was the owner of the remaining eighth, and was captain of the vessel, which was despatched on a voyage to Liverpool. Before the voyage, S. & Co. spent a large sum in repairs, and for the purpose, as was alleged, of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from the plaintiffs, and assigned the freight to them by way of security. On the arrival of the vessel in Liverpool, the plaintiffs obtained an injunction to prevent T. from receiving the freight. *Held*, on appeal, that a part owner who is ship's husband has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him; that the legal right to receive the freight was in the captain; and that in the absence of any sufficient allegation and proof that he was about to misapply it, the injunction ought not to have been granted.

THIS was a motion by way of appeal from a decision of Vice-Chancellor STUART, who had refused, with costs, an application by the defendant Trask to dissolve an injunction.

The defendants Slate & Co. of New York, were the owners of seven-eighths of the ship *Saratoga*, which was an American ship, and they were also the ship's husbands. The defendant Trask was the owner of the remaining eighth, and was also employed as captain of the ship. The uniform practice of the owners was to settle accounts and divide the profits on the return of the vessel to America.

The plaintiffs carried on business at Liverpool, under the firm of Guion & Co., and three of them carried on business at New York, under the firm of Williams & Guion. There was an account current between the two firms, and their practice was, that the credits becoming due to each firm in the country of the other, were transferred to the firm in whose country they became due.

In the early part of November, 1859, Williams & Guion advanced 2000*l.* to Slate & Co. The ship was then on a voyage from Mobile to Liverpool with a cargo of cotton, and was * 374 consigned to William Sager & Son, * of Liverpool. The crew were engaged for a year, which would not expire till after the time required for the return voyage. On November 7th,

Slate & Co. gave to Williams & Guion, as security for their advance, a letter addressed to William Sager & Son, as follows : —

“ We are advised by Captain Trask, of ship Saratoga, now on the passage from Mobile to your port, that he has consigned the ship inward to you. She has on board 2,300,318 pounds of cotton, with freight and primage, amounting to 4917*l.* 15*s.* 2*d.*, against which he has drawn upon you, at sixty days’ sight, for 1538*l.* The balance of her freight, when collected, we will thank you to pay over to Messrs. Guion & Co., to our credit.”

On the 22d of November, 1859, this letter was handed to William Sager & Son. In the following month the vessel arrived at Liverpool. Captain Trask insisted on his right to receive the freight, and this bill was thereupon filed against Captain Trask, Slate, & Co., and the Mersey Dock and Harbour Board, to prevent his receiving it. The bill alleged that “ The defendant B. J. H. Trask claims that the whole of the said freight should be paid to him under some alleged right, which is adverse to the aforesaid claim of the plaintiffs, and the ground of which is unknown to the plaintiffs, and is disputed by them, and the said defendant ought to discover all the particulars of such claim, and how he makes out the same.”

On the 28th of December 1859, the plaintiffs obtained an *ex parte* injunction to prevent Captain Trask from receiving the freight. Captain Trask, on the 31st of December, gave notice of motion to dissolve the injunction. In an affidavit which the defendant Trask filed in support * of the motion, he * 375 deposed that, before the commencement of the voyage, Slate & Co. had made extensive repairs in the ship, and accepted bills of exchange for the amounts due ; that Slate & Co. had stopped payment, and that, according to American law, payment of these bills might be enforced against the captain and the ship on her return to America. No evidence was adduced to disprove this allegation as to American law ; but the plaintiffs, in their bill as amended, made the case that the advance from them had been obtained by Slate & Co. for the purpose of taking up the bills of exchange accepted for the amount due for repairs. It appeared to be the practice that the ship should return to America in ballast, unless an opportunity occurred of chartering her to some English

firm. Captain Trask stated, by affidavit, that it was his intention, on receiving the freight, to make the necessary and proper disbursements on behalf of the ship, and to procure for the return voyage a cargo of salt, which, he alleged, would answer for the purpose of ballast. This motion was refused, with costs, by Vice-Chancellor STUART, who was of opinion that the assignment of the freight was valid. The defendant Trask appealed.

Mr. Walker, Mr. Milward, and Mr. Robinson, for the appellant. — Our case is, that this was a pledge of partnership property by some only of the partners, for their separate debt. The freight was partnership property, being money arising from a joint adventure, and each partner has a right to insist that the expenses of the voyage shall, in the first instance, be paid out of it. A ship's husband has no right to pledge the vessel or its earnings for
 * 376 * money borrowed. Abbott on Shipping. (a) *Green v. Briggs* (b) shows that all expenses of the voyage must be taken into account before the freight is divisible among the part-owners, and no part-owner can pledge more than what is ultimately coming to him. The rights of part-owners are defined in *Holderness v. Shackels*. (c) The captain's is the legal hand to receive the freight, and, unless a case of intended misapplication of it be made out, the Court will not interfere to prevent his receiving it.

Walshe v. Provan (d) was also referred to.

Mr. Bacon and Mr. Kay, for the plaintiffs. — Slate & Co. were ship's husbands, and having spent 2000*l.* on the ship, they borrowed that sum from the plaintiffs for the purpose of paying those expenses. The creditors having received bills from Slate & Co. in payment, Captain Trask and the ship are exonerated. *Evans v. Drummond*, (e) *Reed v. White*, (g) *Thompson v. Percival* (h) Story on Partnership. (i) Captain Trask, therefore, has no occasion to receive the freight in order to indemnify himself. Slate & Co. had a clear right to deal with seven-eighths of the freight, and

(a) Page 85.

(b) 6 Hare, 395, 692.

(c) 8 B. & C. 612.

(d) 8 Exch. 843.

(e) 4 Esp. 89.

(g) 5 Esp. 122.

(h) 5 B. & Ad. 925.

(i) Page 239 (4th ed.).

they have a lien on the entirety of it for their advances on account of repairs. The plaintiffs do not ask to have the freight paid to them, they only ask to have it reserved for future division, that it may not be disposed of in derogation of their rights.

Mr. Walker, in reply.

Judgment reserved.

January 25.

* THE LORD JUSTICE TURNER. — This is a motion to dis- * 377
solve an injunction, granted *ex parte* by Vice-Chancellor Sir JOHN STUART, and to discharge an order made by his Honor, refusing, with costs, an application to dissolve the injunction. The facts of the case have been so recently before the Court, that it is not necessary to enter at all into detail upon them. It is sufficient to state that Messrs. Slate & Co., of New York, were the part-owners to the extent of seven-eighths of an American vessel, called the *Saratoga*, and they were the ship's husbands. The defendant, Mr. Trask, was the captain of the ship, and owner of the other eighth. Messrs. Slate & Co. borrowed a sum of 2000*l.* of the firm of Williams & Guion, at New York, and Williams & Guion remitted that sum of 2000*l.* to their correspondents, a firm of Guion & Co., at Liverpool; the course of conduct between the two houses appearing to have been, that each house remitted to the other the different credits which were coming due in the respective countries. Slate & Co., in order to create a security in favour of Williams & Guion for the 2000*l.* which they had borrowed of them, gave Williams & Guion an order to receive the freight which was coming upon the ship the *Saratoga*, on a voyage which I am about to mention. That order extended, it appears, to the entire freight. Williams and Guion having received that order, as the security for 2000*l.*, remitted it to the Liverpool firm of Guion & Co., the plaintiffs in the present suit. The ship *Saratoga* proceeded from America — from Mobile, I think — to Liverpool; and in the course of that voyage earned freight which, after paying the captain's bills, was more than sufficient to pay the 2000*l.* secured to Williams & Guion by assignment to Guion & Co. The ship arrived at Liverpool, consigned to Sager & Son; and upon her arrival at Liverpool, this bill was * filed by Guion & * 378
Co. for the purpose of restraining Captain Trask from

receiving the freight coming from the voyage from Mobile to Liverpool.

The allegations in the bill for the purpose of this injunction seem to me to be simply these: that Slate & Co. have assigned to Williams & Guion, and through Williams & Guion to Guion & Co., the freight upon this voyage; and I do not find, so far as I have examined the bill, any allegations which would furnish a ground for an injunction to restrain Captain Trask from receiving the freight, except this allegation: "The defendant Trask claims that the whole of the freight of the said ship should be paid to him under some alleged right, which is adverse to the aforesaid claim of the plaintiffs, and the ground of which is unknown to the plaintiffs, and is disputed by them, and he ought to discover all the particulars of such claim, and how he makes out the same." Now, with the utmost deference and respect to his Honor the Vice-Chancellor, in my opinion that is not an allegation on which a special injunction ought to have been granted. The legal right to the receipt of the freight is in the captain. There is no allegation here of any intention on the part of the captain to misapply the freight when he has received it; there is no allegation beyond the simple allegation that the owners of seven-eighths of the vessel have assigned the entire freight of that vessel as a security. So far, therefore, as the injunction was granted on this bill, it rests upon the broad statement that at all times, and under all circumstances, a part-owner of the ship, being the ship's husband, has a right as against the other part-owners of the vessel to assign the entire freight for securing moneys to him. Now that is an allegation which, in my opinion, is unfounded in law; and I think, therefore, that this injunction was improvidently issued on the allegations of this bill.

* 379 * I think, when we examine the facts of this case, it appears, still more clearly that the injunction was improvidently issued; for what are the facts of this case? This ship being an American ship belonging to Captain Trask and Messrs. Slate & Co., it appears that, from the year 1850, when she was first built, down to the year 1858, she has been sailed by the owners on their joint account, and navigated under the orders of Captain Trask; that she has, from time to time, sailed from America and made voyages, and that the course of practice between the co-owners of this vessel has been at all times to settle the accounts between

them, in respect of the freight which was earned by the vessel, on the return of the vessel home to America, making the divisions between the co-owners upon that return and upon that settlement. It appears, further, that the crew of this vessel, upon the present occasion, were engaged for the period of a year; and I cannot see, therefore, that this voyage of the vessel was terminated upon her arrival at Liverpool. Whether the voyage would terminate at the expiration of the year for which the crew had been engaged, or whether it would terminate on the return of the ship to America I do not know; but of this I am perfectly certain, that this voyage was not terminated on the arrival of the ship at Liverpool. Then in what position are the plaintiffs? Why, they are the assignees of an item of profit earned by this ship during the progress of a joint adventure; not an item of profit realized on the result of the entire adventure in which the part-owners of the ship were engaged as partners, but an item of profit earned as part of that joint adventure, and the whole of which might be lost in the future prosecution of that adventure. I think, therefore, that, upon that ground also, this injunction could not be maintained.

Again, it appears that Slate & Co., part-owners and * ship's husbands of the ship, had very extensive repairs * 380 done to the ship before she left New York on her voyage to Mobile, for the purpose of coming from Mobile to Liverpool, and they had accepted bills of exchange drawn by tradesmen by whom the repairs were done. They have accepted these bills to the amount, I think, of somewhere about 10,000 dollars; but they have stopped payment, and these bills, as the case stands before us at present, are unpaid. Now here another question arises: Is or is not the captain liable for these bills? or may or may not the ship be arrested when it comes within the jurisdiction of the Courts of America, for the purpose of paying the expenses incurred in those repairs? It is said that they are not liable, for that Slate & Co. have given bills which were accepted by the creditors in discharge of the liability to which the captain and ship would otherwise be subject. That, as I view the case, is a question of American law, and no evidence as to the law of America on this point has been given by the plaintiffs. The captain swears that he believes that both he and the ship are liable, and we cannot, in the absence of evidence to the contrary, assume in the face of this affidavit, though not made by an expert, that, according to the law of

American, they are not liable. It is still further the American Courts to that effect; but we cannot advise to determine from American authorities on America. What that law is can only be a matter of fact.

What, then, is the result of this case? There is, as I think, in fact the injunction has been granted; secondly, that had the facts been such the injunction would not have been granted; the injunction cannot now be maintained in its present

on the other hand, I think we are bound to say that the owners of the seven-eighths of the ship we ought not, therefore, to permit the captain to receive the freight which he is about to receive, and will a solution of the injunction, for any other purpose to which it ought rightly and properly to be applied; therefore, that the proper order to be made is this: the captain undertaking not to dispose of the freight received by him for the freight, or any part thereof, in the employment of the ship in its service, we will dissolve the injunction; the costs before the Court, and the costs here to be costs in the cause.

Mr. Walker, having given, on behalf of Captain Walker, the undertaking required.

THE LORD JUSTICE KNIGHT PASSEY. — I need not say whether, without this undertaking, the injunction would have been dissolved; but the undertaking having been given, I will make an order for dissolving the injunction.

In the Matter of GEORGE JAMES GORDON, deceased, and
of the Act 13 & 14 VICT. c. 35.

1860. January 26. Before the Lord Chancellor Lord CAMPBELL and the
LORDS JUSTICES.

A debtor was discharged in 1833, under the Indian Insolvent Act, 9 Geo. 4, c. 73, from liability to arrest, and afterwards applied to the Court in India, under 4 & 5 Will. 4, c. 79, for a complete discharge, which that Act empowers the Court to grant to any person "who now is, or shall hereafter become, insolvent." *Held*, that a supplementary order for such discharge had been properly made, and was effectual, and that it was not necessary for the order to recite in the words of the latter Act that the insolvent appeared to the Court to have acted fairly and honestly towards his creditors.

THIS was a motion by way of appeal from the order of the Master of the Rolls, varying the separate certificate of the chief clerk, dated the 12th of December, *1859, whereby *382 the chief clerk certified that a sum of 18,811*l.* 14*s.* 2*d.* was due to the appellant, as administrator of Colonel Mouat deceased, from the estate of a testator named George James Gordon, an account of whose debts and liabilities was in the course of being taken under the above Act. The case is reported below in the 28th volume of Mr. Beavan's Reports. (a)

The testator, George James Gordon, acting under a power of attorney, obtained a grant of letters of administration from the Supreme Court at Fort William, in Bengal, of the estate and effects of Colonel Mouat in India; and under these letters collected and received considerable sums of money on account of Colonel Mouat's estate.

On the 24th of July, 1833, the testator George James Gordon presented a petition to the Court for the Relief of Insolvent Debtors at Calcutta, and he filed his schedule on the 27th of the same month. A firm in which he had been a partner had, in May, 1833, been declared insolvent, and he had filed with his partners a joint schedule. On the 28th of September, 1833, he obtained an order of the Court adjudging him to be entitled to the benefit of the 9 Geo. 4, c. 73, as to the several debts in his schedules, which comprised the amount due from him to the estate of Colonel Mouat.

three months from the making of such assignment as in the 9 Geo. 4, c. 73, directed, or from any such adjudication of insolvency as therein mentioned (as the case might be) to apply by petition for his discharge to any one of the Courts in the East Indies for the Relief of Insolvent Debtors as should have already jurisdiction over the matter of his insolvency ; and that the principal officer of such Court should cause a notice of such petition to be forthwith inserted in the gazette of the presidency within which such Court should be holden ; and the chief secretary of the government of such presidency should, without delay, transmit by different ships two copies at least of every such gazette which should contain such notice to the court of directors, who should without delay cause such notice to be inserted in the " London Gazette ;" and

that all creditors of the said insolvent, either alone or as a
 * 386 partner with any other * person or persons, and either within the limits of the charter or elsewhere, who should not, within fourteen calendar months from the filing of such petition for a discharge as aforesaid, have given notice to the said Court of his dissent from such insolvent having his discharge, should be taken to have assented thereto ; and that thereupon and at the expiration of the said fourteen calendar months from the filing of such petition for discharge as aforesaid, if it should appear to such Court that the said insolvent had acted fairly and honestly towards his creditors, and unless creditors to the amount of one-sixth in number and value of the debts that should have been established in such Court should have given notice of their dissent as aforesaid, or unless a *fiat* in bankruptcy (not being a *fiat* issued under the provisions of the Acts to provide for the relief of insolvent debtors in the East Indies) should have been sued out in England against such insolvent within the time thereafter provided, such Court should be authorized and empowered to order the discharge of the insolvent from liability for debts, claims, and demands of and against such insolvent, and that such order should operate (save as thereafter provided) as a release and discharge from all debts, claims, and demands for which such insolvent was liable at the time of his petition for relief being filed, or of any such act of insolvency committed as aforesaid (as the case might be), and whether within the limits of the charter or elsewhere, and whether such debts, claims, and demands should or should not have been established in such Court as aforesaid ; provided, nevertheless, that such

order should not operate as a release or discharge of any person who was partner with such insolvent, or jointly bound or liable with him.

The 4th section provides "that any such insolvent trader who shall not be made a bankrupt under the provisions * of * 387 the said Act for the relief of insolvent debtors in the East Indies, or of any other Act passed or hereafter to be passed respecting insolvent debtors in the East Indies, if he shall, after such order for his discharge shall have been made as aforesaid, be arrested or have any action brought against him for any debt, claim, or demand for which he was so liable as aforesaid, either within the limits of the charter of the said united company or elsewhere, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became insolvent, and may give this Act and the special matter in evidence, and such order as aforesaid, duly sealed with the seal of the said Court, shall be sufficient evidence in all Courts and places whatsoever of all the proceedings precedent to such order being made and of the same being duly obtained."

It was in 1835 that George James Gordon petitioned the Court for the Relief of Insolvent Debtors at Calcutta for his discharge under the 4 & 5 Will. 4, c. 79, and the above-mentioned order of the 23d of April, 1836, the operation of which was the subject of the appeal, noticed the filing of the petition, and that due notice thereof had been given according to the provisions of the 4 & 5 Will. 4, c. 79, § 1. It also referred to a preliminary order made in the matter of the petition on the 7th of February, 1835, directing that the petition should be received and filed, and that the principal officer of the Court should cause a notice of the petition having been filed to be forthwith inserted in the gazette published at Calcutta, at the presidency of Fort William, in Bengal; and also directing, pursuant to the 7th section of the Act, that the principal officer of the Court should, without delay, transmit to the Court of Directors, by different ships, two or more copies of the schedule filed * by the testator. The order then proceeded * 388 as follows : —

"And also upon reading a petition of the said George James Gordon, filed this day, praying that the said George James Gordon be relieved and discharged from all debts, claims, and demands for

which the said George James Gordon was liable at the time of the said original joint schedule being filed on the 18th day of May, 1833, aforesaid; and also upon reading a certificate that notice had been published in the Calcutta Gazette, and upon proof that the Calcutta Gazette for the month of March, 1835, had been duly forwarded to the Court of Directors, and of the insertion of notice in the London Gazette; and on reading an affidavit of Thomas Holroyd, Esq., the assignee of the estate and effects of the said George James Gordon, sworn this day, an order made in this matter on Saturday, the 28th day of September, 1833, whereby, in pursuance of the 38th section of the Act 9 Geo. 4, c. 73, intituled 'An Act to provide for the Relief of Insolvent Debtors in the East Indies,' the Court did adjudge that the said George James Gordon was entitled to the benefit of the said Act as to the several debts and sums of money due or claimed to be due at the time of the filing of the schedule of the said George James Gordon from the said George James Gordon to the several persons named in his schedule as creditors for the same respectively, or for which such persons have given credit to the said George James Gordon before the time of filing such schedule, and which were not then payable, and as to the claims of all other persons not known to the said George James Gordon at the time of the said adjudication, who might be indorsers or holders of any negotiable security set forth in such schedule; and also upon reading a certificate of John Franks, Esq., the chief clerk of the Court, whereby it appears that he forwarded to the solicitor of the Honourable the East India Company two copies of the schedules filed by the

* 389 * said George James Gordon as well of his joint as of his separate estate and effects; and that no creditors or creditor of the said George James Gordon, either alone or as a partner with any other person or persons, or either within the limits of the East India Company's charter or elsewhere, hath given notice to this Court of their, his, or her dissent from the said George James Gordon having his discharge: It is ordered, pursuant to the terms of the 4 & 5 Will. 4, c. 79, § 1, that the said George James Gordon be and he is hereby discharged from liability for debts, claims, and demands of and against the said George James Gordon."

The representatives of Colonel Mouat received various dividends under the insolvency, but a large balance remained unpaid.

G. J. Gordon returned to England in the early part of 1844, and died there in February, 1853. His executors, on the 27th March, 1855, obtained an order of this Court under the 13 & 14 Vict. c. 35, § 19, which empowers the Court, on the application of executors or administrators, to make an order upon motion or petition of course for taking an account of the debts and liabilities of deceased persons, and gives liberty to any person claiming to be a creditor to apply to the Court by motion for the allowance of any claim not wholly allowed by the Master, and to the executors or administrators to move for the disallowance of any debt or claim allowed by the Master.

Under this order the chief clerk, by his separate certificate, certified that a balance of 18,811*l.* 14*s.* 2*d.* was due from the estate of G. J. Gordon to the representative of Colonel Mouat. The executors of Gordon * took out a summons to vary the cer- * 390 tificate by disallowing the debt, and upon the hearing of the summons the Master of the Rolls made the order appealed against.

Mr. Selwyn and Mr. G. W. Collins, for the representative of Colonel Mouat. — The 4 & 5 Will. 4, c. 79, is not applicable to this case, Mr. Gordon not having been, at the time of passing that Act, a trader “who now is an insolvent debtor within the intent and meaning of the Act 9 Geo. 4, c. 73.” The words of the later statute are not retrospective so far as regards insolvent debtors, and the insolvent debtors pointed to in the Act must be limited to those then insolvent or afterwards becoming so. The person designated by the expression “now is insolvent,” is any person in the position of an insolvent debtor, but whose insolvency was pending, and had not been finally adjudicated upon; that is, any person who had then been adjudged to be insolvent provided no final order had been made in the matter of his insolvency. The testator was then an insolvent debtor, in whose case every thing had been done and concluded by the final order of the 28th September, 1833. After that order was made, his future property did not vest in the assignee of the Court, but in himself, subject only to any proceeding by his creditors. The order of the 23d April, 1836, is defective. It does not set out the facts required to be shown by the statute. There does not appear to have been any affidavit showing to the Court that the alleged insolvent had acted fairly and honestly towards his creditors. The special jurisdiction given

by the statute does not therefore appear on the face of the order, so as to make it available as evidence under the 4th section of the statute. The order, to be valid, must strictly follow the
 * 391 * terms of the statute giving the jurisdiction, particularly where, as in the present case, it is intended to operate as a release to the after-acquired property of the insolvent.

They referred to *Watson v. Humphrey*, (a) *Christie v. Unwin*, (b) *Lee v. Rowley*, (c) *Clagget's Case*. (d)

Mr. R. Palmer and *Mr. Cotton*, for the representatives of G. J. Gordon, were not called upon.

THE LORD CHANCELLOR. — I am of opinion that the order of the Master of the Rolls was right. It seems to me that the legislature intended to transfer the power of giving an absolute discharge to insolvent traders in India from the creditors to the Court. It rested with the creditors under the Statute 9 Geo. 3, c. 73, unless there were effects giving a dividend to a certain amount; but, according to a policy that has prevailed of late times, it has been thought fit that the power should be in the hands of a Court of justice rather than with the creditors; and with that view it seems to me that the Statute 4 & 5 Will. 4, c. 79, was passed; and that applies to those who were insolvent debtors at the time that the Act passed.

Now *Mr. Gordon* was then a debtor; he was insolvent, and owed the money because his discharge under the statute 9 Geo. 4, c. 73, was only a protection to his person within certain local limits, but the debt remained in full vigour in so far as it was not satisfied by the receipt of dividends. Therefore he was an
 * 392 insolvent debtor, and, * being an insolvent debtor, I think he comes within the scope of the 4 & 5 Will. 4, c. 79, and is entitled to take advantage of it; and therefore, if he is discharged properly under that statute, the debt is extinguished.

Mr. Collins has ingeniously argued that the order is bad; and if it were not for the 4th section, by which such subtleties are obviated, there might have been a great deal in what has been argued; but by that section it is provided, "And such order as

(a) 10 Exch. 781.

(c) 8 El. & Bl. 857.

(b) 11 A. & E. 373.

(d) 2 Bank. & Ins. Cas. 101.

aforesaid, duly sealed with the seal of the said Court, shall be sufficient evidence in all courts and places whatsoever, of all the proceedings precedent to such order being made, and of the same being duly obtained." Now it is "such order." Therefore, we must look back to see what that order is, and I think it is the one first mentioned in the first section of the Act of Parliament, which says that the Court may order "the discharge of such insolvent from liability for debts, claims, and demands of and against such insolvent;" and then immediately follows, "such order shall operate as a release." Therefore the order here meant is the order directing that he shall be discharged. There is that order in the present case, because it does require him to be discharged; and I think that the necessity is thus obviated of setting out upon the face of the order all the requisites that would be necessary for giving the Court jurisdiction, and that this order, which is sealed by the Court, and is an order for his discharge, is sufficient evidence in all Courts and places whatsoever of all the proceedings precedent to such order being made, and of the same being duly obtained. Therefore I think it is the same as if all the requisites giving the Court jurisdiction to grant the order had been expressly set out on the face of it; that the order is good *ex facie*; and that the Master of the Rolls properly varied the certificate of * the chief clerk, and held that the debt was * 393 barred by the discharge under the second Act of Parliament.

THE LORD JUSTICE KNIGHT BRUCE. — I agree, thinking it, however, a material circumstance that at the time when the Act which is under consideration passed, the debtor was, under his former insolvency, in a position analogous to that of an uncertificated bankrupt, with protection to his person, but subject to a liability to have all his property taken from him. Therefore I consider that he was within the description of an insolvent at the time.

THE LORD JUSTICE TURNER. — I also agree. It seems to me plain, upon the construction of the Act of the 4 & 5 Will. 4, c. 79, that it was intended to extend the powers given by the 9 Geo. 4, c. 73, so as to enable the Court to discharge insolvent debtors who had to a certain extent obtained the benefit of the Act of 9 Geo. 4, c. 73; that intention is, I think, to be collected clearly from

the recitals of the Act, referring as those recitals do in terms to the intention "to extend and add to the provisions of the said Acts, so as to give to insolvent debtors, being traders, who shall have acted fairly and honestly towards their creditors, an additional and more complete discharge, and also to render more effectual the means of obtaining such discharge, and at the same time to preserve to such insolvent debtors such relief as is already afforded by the said recited Acts." The intention seems to be at the same time to give the relief already afforded, and also to add to and extend that relief. With reference to the objection taken

as to the form of the order, it seems to me not immaterial * 394 to observe, that this order does, in truth, upon the * face of it, mention this gentleman not merely as a trader, but as a trader seeking the benefit of the Act of Parliament passed in the 9th year of his late Majesty's reign, intituled, "An Act to provide for the Relief of Insolvent Debtors in the East Indies." I think, therefore, that upon either point this petition of appeal must be dismissed.

HODGSON v. CLARKE.

1860. January 26. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A testator bequeathed 4000*l.* in trust for his brother for life, and after his decease upon trust to pay or divide the principal sum unto or equally between the child or children of the brother living at his decease except Thomas (his eldest son), and the issue then living of any (except the said Thomas) then dead, such issue taking their parent's share only. It was shown by parol evidence, that Thomas was the youngest son of the testator's brother at his decease; and that, to the testator's knowledge, when he made his will, the eldest son of his brother was possessed of a large fortune, while the youngest and other children were unprovided for. *Held*, that the eldest son, and not Thomas, was the son intended to be excepted.¹

THIS was an appeal from the construction put by Vice-Chancellor STUART upon a bequest of 4000*l.* to trustees upon trusts, after

¹ See 1 Jarman Wills (3d Eng. ed.), 350; 1 Story Eq. Jur. § 179; Wigram Wills, Props. III. V. VII; *Del Mare v. Rebello*, 3 Bro. C. C. (Am. ed. 1844) 451, and cases cited; *Holmes v. Custance*, 12 Ves. (Am. ed. 279, note (a)).

the decease of the testator's widow, thus expressed "to pay the interest and dividends thereof to my brother James Clarke during his life, and from and after his decease, upon trust to pay or divide the principal sum unto or equally between the child or children of my said brother living at his decease (except Thomas, his eldest son), and the issue then living of any (except the said Thomas) then dead, such issue taking their parent's share only."

The question was, whether the exception referred to Robert Addison Clarke, the eldest son of the testator's brother, or to Thomas Clarke, his youngest son, or was void for uncertainty. It arose upon the petition of Thomas, presented after the death of the testator's * widow, for payment to the peti- * 395 tioner of one-third of the fund bequeathed in trust for the children of the testator's brother James, on the ground that the eldest son of James was not entitled to participate in the benefit of the bequest.

In support of the petition, evidence was adduced showing that the testator's brother had four children; — Robert Addison Clarke, the eldest; Thomas Clarke, the youngest; one other son and a daughter; that the eldest son was, to the knowledge of the testator, entitled to a fortune of 2000*l.* a year, under the will of his maternal grandfather, while Thomas was also, to the knowledge of the testator, totally unprovided for, and that there was no known reason why Thomas should have been excluded.

The Vice-Chancellor held the bequest void for uncertainty. The case is reported in the first volume of Mr. Giffard's Reports. (a)

The daughter appealed.

Mr. Malins and *Mr. Jessel*, in support of the appeal. — It is submitted that the fund in question is divisible into thirds, and not into fourths as declared by the order of the Vice-Chancellor. A bequest ought not to be held void for uncertainty if the Court has the means of arriving at a reasonable degree of certainty as to the intention. *Adams v. Jones*. (b) The ambiguity here is not apparent on the face of the will, but arises wholly out of the circumstances disclosed by extrinsic evidence, and may therefore be removed by evidence of the same * nature; and, * 396 at all events, the Court may and is bound to place itself in the same situation as to knowledge of surrounding facts as the

(a) Page 139.

(b) 9 Hare, 485.

testator was, so far as the circumstances of the case admit. *Doe d. Le Chevalier v. Huthwaite*, (a) *Bradshaw v. Bradshaw*, (b) *Lord Camoys v. Blundell*. (c) The evidence here shows that, to the knowledge of the testator, the eldest son was amply provided for, while Thomas, the youngest, was wholly unprovided for, and that, therefore, the mistake in the will is in the name and not in the description. The circumstance that in the latter part of the gift the name Thomas is repeated weighed with the Vice-Chancellor. This, however, occurred also in some of the cases which have been cited, and all that can be inferred from it is that the testator, in writing the name, did not make a mere slip of the pen, but meant deliberately to write it. The evidence shows that the testator had but little communication with the family of his brother, and that, though aware of the ample provision for his eldest nephew, he might very well be mistaken as to his name.

Mr. Birkbeck, for the petitioner Thomas, the youngest son of the testator's brother James, took the same course of argument.

Mr. Hobhouse, for Robert Addison Clarke. — In the cases which have been cited, there was a scheme of disposition appearing upon the will or instrument itself, which weighed much with the Court in coming to a conclusion as to whether the error was in the description or in the name. That is not so in the present * 397 case, and the extrinsic evidence is not, it * is submitted, sufficient to explain the ambiguity in question. That being so, the exception must necessarily fail for uncertainty. *Drake v. Drake* (No. 2). (d)

Mr. Jessel. — That case is under appeal to the House of Lords.

Mr. Malins, in reply.

THE LORD CHANCELLOR. — I am of opinion that the order under appeal ought not to be affirmed. The question in this case arises upon a latent ambiguity, and it was very properly conceded by *Mr. Hobhouse* that parol evidence was admissible of the circumstances existing at the date of the will for the purpose of arriving at what

(a) 3 B. & Ald. 632.

(b) 2 Y. & C. Exch. 72.

(c) 1 H. L. Cas. 778.

(d) 25 Beav. 642.

the intention of the testator was.¹ That evidence has been admitted ; and it has been proved, and is not disputed, that Robert Addison Clarke, at that time, had a considerable family estate and was amply provided for ; that the two other sons of James Clarke were wholly unprovided for ; and that these facts were known to the testator. Under these circumstances it seems to me that we cannot treat the exception as a nullity, and read the gift as if no such exception had been made, but that we are bound to determine whether the name or the description of the person intended to be excluded is to prevail. It appears to me that, whether we consider the case upon its own circumstances merely, or in connection with the cases which have been cited, the strict conclusion is that the description " eldest son " of the person intended to be excluded, and not the name, must prevail ; and that the plain intention of the testator was that the property should be divided equally in thirds between the younger children of his brother James.

* THE LORD JUSTICE KNIGHT BRUCE. — I am of the same * 398 opinion.

THE LORD JUSTICE TURNER. — I also agree in the conclusion which has been arrived at. There can be no doubt that in cases circumstanced as the present is, parol evidence of the motive of the testator in making the exception is admissible. The only question that can arise in such cases seems to me to be, whether the parol evidence adduced is or is not sufficient to enable the Court to say what the intention of the testator was. Now as regards Robert Addison Clarke, the circumstances disclosed by the evidence clearly point to a competent motive for his exclusion by the testator ; but as to the three other children of James Clarke, no such ground for exclusion is shown. Upon the result of the evidence, I think there is sufficient to show that the testator has made a mistake in the name and not in the description of the nephew to be excluded from the benefit of the bequest.

As the testator has created the difficulty, and the fund has not been set apart, the costs of all parties, including the costs of the appeal, must be paid out of the estate.²

¹ See 1 Story Eq. Jur. § 179 ; Wigram Wills, Props. V. VII.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1426.

said birthplace, and also of restoring the said birthplace to its original state, or as near thereto as the said parties hereto of the second part can ascertain, shall stand and be possessed of the residue of the said sum of 2500*l.* upon such trust and to and for such purpose as the said John Shakespear shall, by deed intended to be prepared and executed by him and the said parties hereto of the second part, declare and provide concerning the same. Provided always, and it is hereby declared and agreed, and the said John Shakespear doth hereby direct that, in case default shall be made by him in executing the said deed, or declaring the trusts of the residue of the said sum of 2500*l.* within six calendar months from the date hereof, that then the said trustees, parties thereto of the second part, shall and may appropriate and apply the residue of the said sum in or towards the restoration and preservation of the said birthplace, as they in their discretion and judgment shall think necessary and proper."

By his will, dated the 17th November, 1856, the testator, among other things, gave and bequeathed as follows:—

"I give to my said trustees and executors, out of my personal estate, and before any other legacies, the sum of 2500*l.*, to be laid out by them as they shall think fit, with the concurrence of the trustees of Shakspeare's house, already sanctioned by me, in forming a museum at Shakspeare's house, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to
 * 402 my wishes. I direct, moreover, that, * out of the rents of the Langley Priory estate, the sum of 30*l.* half-yearly, namely, on the 24th day of June and on the 24th day of December of each year following my decease, be applied to the wages of a keeper or guardian, whose duty it shall be to reside at Stratford-on-Avon, near Shakspeare's reputed birthplace, attend the visitants, and offer to them a bound-up volume, with pen and ink, to inscribe, on certain conditions, such lines, in verse or prose, as the fancy of each visitant may induce to write; and I will that this half-yearly payment be a rent-charge for ever upon the Langley Priory domain,—consisting of the mansion-house and 550 acres or thereabouts of land adjoining."

The testator never executed any deed for declaring, nor did he in anywise declare, the trusts of the residue of the 2500*l.*

He died on the 9th of June, 1858, and the executors declined to concur with the plaintiffs in applying the legacy of 2500*l.* in accordance with the testator's wishes, without the direction of the Court; and they also alleged that the half-yearly rent-charge of 30*l.* was not well charged upon the Langley Priory domain.

The plaintiffs thereupon filed the bill in the present suit, praying that the trusts of the legacy of 2500*l.* might be ascertained and declared under the direction of the Court; that, if necessary, a scheme for the application thereof might be settled, and the legacy be ordered to be paid and applied accordingly; and that it might be declared that the half-yearly rent-charge of 30*l.* was well charged on the Langley Priory estate, and that the same might be ordered to be raised and applied in accordance with the will.

* On the 8th December, 1859, the cause was set down for * 403 hearing before Vice-Chancellor WOOD, when his Honor made the decree under appeal.

Mr. Daniel and *Mr. Martindale*, in support of the appeal. — The intention of these bequests was merely to accomplish the private purposes of the subscribers represented by Shakspeare's Birthplace Committee. Those subscribers having purchased the fee-simple of a particular estate with particular objects in view, another individual, approving of the purchase and approving of the objects, by his will bequeaths a sum of money and a rent-charge to be applied for the lawful purpose of the improvement of the purchased estate. When the museum was completed, the trust of the property purchased by the committee in 1848 was exhausted, and the property purchased became the private property of the subscribers. *Briggs v. Penny. (a)*

There is here no public or charitable trust expressed, nor can such a trust be inferred from any thing on the face of the will, or in the deed of 1858, to which the will refers. The private character of the gift is not altered by the subsequent words, "for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes;" for these wishes must be read as referring to the objects previously

(a) 3 Mac. & G. 546.

expressed, and as limited to the formation, improvement, and enlargement of a museum. *Townley v. Bedwell.* (a) A trust for

such a purpose is not too vague or uncertain for this Court

* 404 to execute by * means of a scheme. *Carne v. Long,* (b)

Trustees of the British Museum v. White. (c) The gifts in question do not infringe the rule against perpetuities, for as they are made to private individuals, there is nothing to prevent those individuals with the concurrence of the trustees from selling the trust property. The concurrence of the Attorney-General in such a sale would be unnecessary.

Mr. Rolt, Sir Hugh Cairns, and Mr. H. P. Roche, for the defendants. — Assuming the gifts to be for private individuals, upon a private trust, and not for a charity, they are void for uncertainty. A trust for the formation of a museum is not sufficiently definite for the Court to execute. The objects of the museum pointed to in the will are not expressly confined to the collection and preservation of Shakspearian relics, but the words of gift are consistent with a range over every department of art, science, or literature. It would be impossible for the Court to say when there would be default in the performance of the trusts. That difficulty might be met, perhaps, in the case of a charity, by a scheme *cy-près*: but not so where the trust is a private one. The gifts, moreover, are not simply for the formation of a museum, but for that and such other purpose as the trustees shall think desirable, in order to give effect to the testator's wishes. The words "other purpose" are not necessarily to be confined to a purpose connected with the formation of a museum, but may apply to one of a different character. The gifts, therefore, are void for uncertainty. *Ellis v. Selby.* (d)

* 405 * If they are not void as charitable or for uncertainty, they are so as tending to create a perpetuity. The plain object of the gift is not merely to form a museum, but to maintain it throughout all time for the admission of visitors. This is shown by the terms of the gift of the rent-charge. The testator cannot be supposed to have intended a gift of so much money to the owners of Shakspeare's house, as would be sufficient to form and maintain a museum, whether the museum was formed or main-

(a) 6 Ves. 194.

(b) 27 Law J., N. S., Ch. 589.

(c) 2 Sim. & Stu. 594.

(d) 7 Sim. 352.

tained or not. Lastly, if the gift, so far as it relates to the formation of a museum, might be upheld as charitable, still the gifts are void, as the discretion given to the trustees extends to purposes of an indefinite nature, and not charitable.

They referred to *Williams v. Kershaw*, (a) *Morice v. The Bishop of Durham*. (b)

Mr. Daniel, in reply, cited *Attorney-General v. Stepney*, (c) *The University of London v. Yarrow*. (d)

THE LORD CHANCELLOR. — We must all feel such an inclination in favour of giving effect to the bequest, that it is necessary to enter into a covenant (as a Chief Justice once said about entering into a covenant about peerages) not to violate the rules which have governed the Courts on such subjects. All must be delighted at any thing that can be done to do honour to the memory of such a remarkable man as Shakspeare; but I think the Court below came to a right conclusion, that this bequest was altogether void.

* It is quite clear that it cannot be supported as a charitable bequest. *Mr. Daniel* did quite right to abandon that. * 406
The great latitude, then, that has been established with regard to the construction of charitable bequests cannot apply, and this is a bequest to individuals, and still upon a trust, not for their own private benefit. It is quite clear that it was not intended that those who were to have the disbursement of the 2500*l.* could apply any portion of it to their own benefit. It was a trust, and I think that the *cestuis que trust* must be considered to be the subscribers to the fund with which Shakspeare's birthplace was purchased. Then that being so, it seems to me that it is void in the first place for uncertainty.

I think we might get over the alleged uncertainty as to the erection of a museum at Shakspeare's house, because, applying the common understanding to that phrase "museum" we could perfectly well direct what ought to have been done, and at Shakspeare's house, which is the locality. But then follows what seems to me to be fatal to the bequests as to private individuals, "and for such other purpose as my said trustees, in their discretion, shall think

(a) 5 Cl. & Fin. 111, n.

(c) 10 Ves. 22.

(b) 10 Ves. 522.

(d) 1 De G. & J. 72.

fit and desirable for the purpose of giving effect to my wishes." This is something beyond the formation of a museum, and it is something not necessarily *ejusdem generis*, when this is not to be considered as a charity, and then it is "for giving effect to my wishes." Now, there is nothing here to connect any written document with the wishes that appear expressed on the face of the will; and we cannot at all know what those wishes were, without violating the rules of law relating to the admission of parol evidence to add to or vary the effect of the will. I think that the bequest is clearly void for uncertainty as to this portion of the destination of the fund.¹

* 407 * But if we could discover or really guess that it was the real intention of the testator, about which, as a private individual, I have no doubt, that there should be a structure erected at Stratford-upon-Avon, in the house where the immortal Shakspeare was born, or near it, and that this should be a museum, then it is quite clear that it was the intention of the testator it should exist *in sæcula sæculorum*. That intention is even expressed on the face of the will, because, when you come to look at that part in which he charges the estate with 60*l.* a year for a custodian, it is quite clear that was to be perpetual; and if you look to the intention of the testator, to be gathered from the will, then his intention was that this should be laid out upon a building that was to stand and be perpetual in memory of Shakspeare. That is a perpetuity, and not being a charity, it is void.²

It seems to me unnecessary to enter into the various cases that have been very properly brought before us. For these short reasons, I am of opinion that the appeal must be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — It is almost, if not altogether, with regret that I have found myself arriving at the same conclusion.

I think it clear of doubt that the legacy was not given beneficially to any person or persons whomsoever, but that it was a legacy intended by the testator to be applied by those to whom it was given in some manner otherwise than for their own benefit; that is to say, upon some trust or for some purpose in the nature of a trust. If that is so, it must follow that, unless he has suffi-

¹ See Perry Trusts, § 713.

² See Perry Trusts, §§ 383, 384.

ciently expressed a legal purpose, the legacy wholly fails. On * looking at the instrument in that point of view, the * 408 reader is struck at once by the words "and for such other purpose as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes." If that member of the sentence cannot be connected with the formation of a museum, the whole of necessity fails for uncertainty, and I am not sure that it can be connected with the formation of a museum. I am not sure, therefore, that the whole does not fail for uncertainty.

But let it be assumed that, on the true construction of the irregular and inaccurate manner in which this great Oriental scholar (for such I believe the testator was) has expressed himself in writing, let it be assumed, as very possibly it may be quite right to assume (to assume I mean effectually), that the words which I have mentioned, namely the words, "and for such other purpose as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes," are to be connected with the object of forming a museum; and to be restricted to such objects as are intimately and closely connected with the museum; still in that point of view, the object is a museum. A museum, where? At Shakspeare's house. But it is, as I understand, proved, if not admitted, that the property called "Shakspeare's house" is not devoted to what we call purposes of mortmain; that it belongs absolutely to certain persons, and that the application of it for any particular purpose cannot be compelled. Then the question would arise, or might arise, whether the case, nevertheless, falls within those cases where a gift for a charitable or public purpose will be supported by the Court (to use our own technical language) *cy-près*, where the particular mode to which the testator has pointed cannot be used, cannot be adopted, cannot be applied. There are cases of that * description, * 409 of which the case of the *Attorney-General v. Stepney (a)* is a striking instance, a case I have no doubt rightly decided; and therefore, perhaps, if the object of a museum could be dissociated from Shakspeare's house, it might be possible to support the gift. But I am of opinion that this case falls rather within the principle of the *Attorney-General v. Whitchurch (b)*, and other cases of that description, where a particular place is of the essence of the

(a) 10 Ves. 22.

(b) 3 Ves. 141.

establishment, and where you cannot impute to the giver an intention independent of place. That is my opinion upon this testator's will, and under the impossibility, which as I think exists, of imputing to him any intention independent of place, you find that the place which he has selected is one not devoted to charity, not devoted to any public purpose, and the appropriation of which to any such object as he has pointed out cannot be secured.

For these reasons I think that the legacy wholly fails, and agree that the bill was (I am almost sorry to say so) properly dismissed.

THE LORD JUSTICE TURNER. — I entirely agree, and so precisely for the same reasons that have been assigned, that it is quite unnecessary for me to express them.

* 104

* WYLIE *v.* WYLIE.¹

WYLIE *v.* ENOHIN.

1860. February 15, 17. Before the LORDS JUSTICES.

A British subject domiciled in Russia made a will in the Russian language and in Russian form, commencing with the statement that he thereby disposed of all his property. He then directed a sale of his landed estates in Russia, which he specified, and proceeded to make a disposition of "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money, and in bank billets, belonging to me." He then closed his will with the statement that as all his property was entirely his own, and acquired by himself, nobody had a right to interfere with or contest his dispositions or those of his executors. It was proved that "bank billets" were a particular kind of Russian negotiable securities. At the time of the testator's death, he had, beside his Russian property, a large sum in the English funds. *Held*, that the words "in ready money and in bank billets" were not merely words of defective enumeration, but a description comprising the whole subject of the gift; that the description of the gift being clear and unambiguous, the first and last clauses of the will were not sufficient to extend the meaning of that description, and that the testator's property in the English funds was undisposed of.²

¹ S. C. affirmed, 10 H. L. Cas. 1.

² See *Slingsby v. Grainger*, 7 H. L. Cas. 273; *West v. Lawday*, 11 H. L. Cas. 379, 380; 1 *Jarman Wills* (3d Eng. ed.), 493, 715; *et seq.*, 723, 724, and note (m).

THIS was an appeal by the defendants Enohin and others from a decree of Vice-Chancellor Wood, declaring that Sir James Wylie, the testator in the cause, had died intestate as to all his property in the public funds of Great Britain.

The testator was a native of Scotland, but was domiciled in Russia at his decease. He possessed a large property in Russia, and a sum of above 60,000*l.* consols. He died in 1854, having made a will valid according to Russian law, and written in the Russian language. The material parts of this instrument as appearing in the translation, of which probate was granted, were as follows : —

“ I, the undersigned actual privy councillor James Wylie, being of sane mind and clear memory, make this will, by which, in case of my death, I dispose of all my movable and immovable property honestly acquired by myself, in the following manner : My two stone buildings situate First Admiralty Section, Fourth Quarter, with all the household establishments and different articles * belonging to them, with the exception of such articles to * 411 which I shall give a separate destination, also my property or estate situate in the province of St. Petersburg, in the districts of New Ladoga and Schlussemburg, in different villages, with the peasants (excepting only those of my serfs, who for their faithful and zealous services to my person shall be set free), and all my woodlands, with farms and country houses, and in general with all the economical establishments therein, I destine to be sold. The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts : two of these I destine to be employed in arranging a decent funeral and erecting a monument to me, and also in acts of charity in my commemoration, at the discretion of the executors. Of the remaining eight parts, I intend making afterwards a detailed disposal, but should I from any cause whatsoever not dispose,” &c. ; the testator here expressed his wish, in that event, to lay the same at the feet of his Imperial Majesty, “ to be employed for some establishment of public or charitable benefit which might bear his name.” Then, after bequeathing to the Medico-Chirurgical Academy a silver vase, which had been presented to him as a testimonial, he proceeded : “ As executors of this my testament and my will, which shall hereafter follow as a supplement to this testa-

ment, I name the actual councillors of State, Iwan Wassil-yewitch Enohin and Wassily Sergeywitch Saharoff, and the titular councillor, Alexander Petrowitch Ewfanoff. . . . Therefore any other disposal made previous to this one concerning my movable and immovable property, by whatever papers and acts such might be found, or by whomsoever produced, shall be considered as of no effect, null and void, and as of no power, and that such papers and acts shall not be accepted from anybody, and that no

* 412 disposal or proceeding * shall be effected according to them; and as all my movable and immovable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same, under any pretence whatever; and, likewise, no one has a right to interfere with or contest the dispositions of my executors."

Shortly after the testator's decease, his brother Walter Wylie, obtained letters of administration to his estate in England, supposing him to have died intestate, and the first above-mentioned suit was instituted by one of the next of kin, to have his estate administered by the Court. A decree was made in this suit by Vice-Chancellor Wood, in June, 1855, directing, among other things, an inquiry as to the testator's domicile, and whether he had made any testamentary disposition according to the law of the country of his domicile. The existence of the Russian will having been found, the Vice-Chancellor directed notice of the proceedings to be given to the Russian executors, who took proceedings, the result of which was, that the grant of administration to Walter Wylie was revoked and probate granted to them. The plaintiff in the first suit then filed his bill in the second suit to establish that the testator had made no disposition of his English property: The Vice-Chancellor made a decree containing a declaration to the effect stated above. The Russian executors appealed.

It was proved that the words translated "bank billets" were words exclusively applicable to a species of securities well known in Russia, being obligations by certain Russian banks to repay certain sums of money with interest, which securities were negotiable by indorsement, and that the word translated "capital"

* 413 had * the same meaning as the English word used in its widest sense. It was ascertained, in answer to questions from the Court, that the expression, "in ready money and in

bank billets," was an accurate rendering of the original; for that, although the second "in" was not found there, the two substantives were in the same case, and governed by the preposition. It was also proved that there was no rule of Russian law entitling an executor to take the undisposed-of residue beneficially.

Mr. W. M. James and *Mr. T. H. Hall*, for the plaintiff, in support of the decree. — There are no words in this will that can, upon any fair construction, pass the English funded property. The expressions at the beginning and end of the will referring to a complete disposition of the testator's property would be sufficient to determine the Court to give the more extended meaning to words of doubtful import, but cannot alter the meaning of plain words. In *Sir Brook Brydges' Case*, (a) on which the appellants relied below, there was a *videlicet*, followed by an imperfect enumeration of particulars, and it was decided only that this imperfect enumeration was a *falsa descriptio*, and did not restrict the preceding words, which were wide enough to pass every thing. *Cambridge v. Rous* (b) is similar, the decision being merely that certain words did not restrict what went before. *Fisher v. Hepburn* (c) went on the same principle. In the present case, there are no words of gift wide enough to pass all the personal estate: there is no gift of any thing but ready money and bank billets; and even if there had * been, these words * 414 might have operated by way of restriction. *Roe v. Vernon*. (d)

Mr. Rolt and *Mr. Brooksbank*, for another of the next of kin. — The executors lay great stress on the testator's expression of his intention to dispose of every thing; but the force of this argument is taken away by the expression of an intention to make a further testamentary disposition, so that there is no strong inference that he meant to dispose of every thing by this instrument. "Capital," no doubt, is a generic term, which, if it had stood alone, would have passed the property in question; but it is restricted in two ways: first, by the words, "which shall remain with me," words more naturally applying to ready money and securities in his own possession than to mere *choses in action* like

(a) Vin. Ab. Devise, O. b. 13.

(c) 14 Beav. 626.

(b) 8 Ves. 12.

(d) 5 East, 51.

stock; secondly, by the use of the words "in ready money and in bank billets." These words do not occur in the form of a defective enumeration, it is only property of that description that is given. The testator directs a sale of his houses, but does not direct a conversion of the property comprised in his gift, thus showing that he himself understood it as consisting of ready money, or property equivalent to ready money, and not to property which would naturally be the subject of sale.

Mr. Daniel, Mr. Martineau, and Mr. Roberts, for others of the next of kin.

Sir H. M. Cairns and Mr. Karlake, for the appellants.—

The will may be looked at as consisting of three parts,
 * 415 — * the introductory words, the close, and the disposition, the effect of which is now in question. If the terms of this disposition are clear, there is no occasion to look further, but unless they clearly admit of no more extended construction than the respondents contend for, they may be construed by aid of the introductory and closing parts. In the beginning of the will, the testator declares his intention to dispose of his whole property "in the following manner." This leads us to expect in the will a disposition of the whole. Then by the final clause he declares that no one has a right to contest the dispositions of his executors, which words stand in immediate connection with words clearly relating to his whole property, so that the final clause, in fact, comes to the same thing as a declaration that by this will he has disposed of all his property. He did not intend to leave any thing to his relatives; and with a view to this he states the circumstances which as he considered gave him a moral right to dispose of his property without regard to them. The argument that he intended a further disposition is of no weight: he only intended to make it as to the eight shares, of which he makes by his will only a provisional disposition. The intention to make a complete testamentary disposition is plainly expressed, and unless the operative words used are clearly and plainly insufficient, they must be construed sufficient by the help of such a context as this. The closing part of the will amounts to a gift by means of recital. *Jordan v. Fortescue*, (a) *Bibin v. Walker*. (b) The words of gift

(a) 10 Beav. 259.

(b) Ambl. 661; 1 Jarman Wills, 441.

are not clearly and plainly restricted to the limits contended for by the respondents. If the testator had intended to give nothing but ready money and bank billets, he would have said, "such of my capital as is in," &c., or "so much of my capital as is in," &c., or have given * the ready money and bank billets, * 416 without any mention of capital, which on the respondents' construction is quite surplusage. The fair construction is that ready money and bank billets are words of enumeration only, and so not restrictive. *Sir Brook Brydges' Case*, (a) *Cambridge v. Rous*, (b) *Chalmers v. Storril*, (c) *Whateley v. Spooner*, (d) *England v. Downes*, (e) *Passmore v. Huggins*. (g) In *Waite v. Coombes*, (h) Vice-Chancellor PARKER held that a context much less strong than this would have passed stock if there had not been words of gift which in themselves were sufficient to pass it. On the above grounds, we say that even if the dispositive clause is ambiguous, the funded property must be held to pass; but we say it is not ambiguous, for that the words "the whole of my capital" are repugnant to words confining the gift to ready money and bank billets. The Vice-Chancellor met the difficulty arising from the commencement and close of the will by referring to the intention to make a future disposition. But it is evident that the testator did not contemplate a future disposition of property not already included in his will. Then the Vice-Chancellor thought the words of enumeration restrictive, which we submit is opposed to the authorities.

[THE LORD JUSTICE KNIGHT BRUCE.—Do cases in which the generic term precedes the specific terms, and those in which it follows the specific terms, stand on the same footing?]

Then his Honor disposes of the last clause by saying that it cannot amount to more than a declaration that the next of kin shall not take, which of course would be inoperative unless the property were given to some one else; but * that does * 417 not take away the effect which such words, even if they do not amount to a gift by recital, have in explaining the disposition in the middle of the will. In *Roe v. Vernon*, which is referred

(a) Vin. Ab. Devise, O. b. 13.

(e) 2 Beav. 522.

(b) 8 Ves. 12.

(g) 21 Beav. 103.

(c) 2 Vea. & Bea. 222.

(h) 5 De G. & Sm. 676.

(d) 3 K. & J. 542.

to against us, the restrictive words formed an integral part of the description of what was given.

Mr. W. M. James, in reply. — The appellants seek needlessly to introduce words into the will in order that what is a *limitatio vera* may become a *demonstratio falsa*. They would read the clause thus: "The whole of my capital, which I say will be found in ready money and bank billets," the latter part being both superfluous and erroneous, whereas on our construction the words actually used are useful and correct.

THE LORD JUSTICE KNIGHT BRUCE. — The single question for decision upon the present occasion is, whether the testator, by his will, has disposed of the beneficial interest in a sum of 60,000*l.* 3*l.* per cent consolidated bank annuities, which stood in his name in this country, forming part, and more probably an inconsiderable than a considerable part, of his entire means. He was a British gentleman belonging to the medical profession, who had acquired a Russian domicile. His will was made in Russia, in the Russian language, and must, of course, be construed with reference to the Russian law.¹ The will has been proved in this country by reason, and, it is probable, solely by reason, of the British stock that I have mentioned; and it has been so proved in the form of a translation, the correctness of which is not attempted to be, if it could be, impeached. At first a possible difficulty presented itself to my mind upon the Russian law, the state of which we
*418 are not *acquainted with, unless by means of the evidence to which I am about to refer. That difficulty, however, has been removed by the circumstance that there is on each side the evidence of Russian lawyers; and the whole of that testimony leads to the conclusion that the construction of this will, as respects the bequest in question, ought to be the same according to Russian law as it would be by the English law. The words to be construed, as translated, are these: "the money proceeds of all the above" ("the above" includes property strictly Russian, and

¹ See *Harrison v. Nixon*, 9 Peters, 483, 504; *Bowditch v. Soltyk*, 99 Mass. 138; *Talbot v. Seeman*, 1 Cranch, 38; *Di Sora v. Phillips*, 10 H. L. Cas. 624; *Knapp v. Abell*, 10 Allen, 485; *Yates v. Thompson*, 3 Cl. & Fin. (Am. ed.) 545; 1 *Jarman Wills* (3d Eng. ed.), 2 *et seq.*, (4th Am. ed.) 3, [2], *et seq.*; *Story Conf. Laws*, §§ 465, 479, *et seq.*; 2 *Greenl. Ev.* § 671 *et seq.*

refers to property alone strictly Russian) "as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts." Then he goes on to dispose of those ten parts. It is first said that by these words alone the beneficial interest in the consolidated British stock passes. I certainly am not of that opinion. How it might be if the word "in" had been omitted it is unnecessary to say, for the word is there; it is not "as also the whole of my capital which shall remain with me after my death, ready money and bank billets," in that case a question might have arisen; but it is "the whole of my capital which shall remain with me after my death, in ready money and in bank billets." The second "in," which is said not to be in the original, seems of no consequence. Whether it be considered as present or absent, the reading of the will must I conceive be the same; for the first "in" is unquestionably in the original, and unquestionably translated with correctness. What he gives, therefore, by these words is, his capital in ready money and bank billets. It is impossible, I think, to read that passage as applying to the English stock.

It is said, however, that the words are ambiguous, and that there is to be collected from other parts of the will * an * 419 intention to dispose of the whole of his property, and therefore that construction ought, in construing the ambiguous words, to prevail. The words upon which reliance is placed in that respect are words at the beginning of the will, where the testator says: "By which in case of my death, I dispose of all my movable and immovable property honestly acquired by myself in the following manner." That certainly may be at least fairly argued to exhibit a purpose in his mind at the commencement of his testamentary disposition to proceed to dispose of all his property. It is, however, a common circumstance for a testator to commence his will in language indicating an intention to dispose of all that he has, and to proceed to make a partial disposition only. The appellants, however, are fairly entitled to call those words in aid of their argument; and I assume that they do indicate an intention to proceed to a disposition of the whole; but the intention of course is not enough, the purpose must be carried into effect; and the words which I read at the outset are, in my view, not ambiguous, and can, in my judgment, be read only in one way, namely, as applying merely to a part of the property. There is language,

however, in subsequent parts of the will, less strong certainly than that at the outset, but still fairly susceptible of argument in the same direction. When he appoints his executors, he says: "With the condition that my property shall remain until its final sale under the administration of the titular councillor," naming him, "to whom I grant full power to set free those of my peasants who are now and who shall remain faithfully and zealously in my service at the time of my death." And further on he says: "Therefore any other disposal made previous to this one concerning my movable and immovable property, by whatever papers and acts such might be found, or by whomsoever produced,

* 420 shall be considered as of no effect, null and void, and as * of no power, and that such papers and acts shall not be accepted from anybody, and that no disposal or proceeding shall be effected according to them; and as all my movable and immovable property is mine own and honestly acquired by myself, so nobody has a right to interfere with my dispositions, and contest the same under any pretence whatever, and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors." These words are also fairly enough brought into the argument as assisting the contention that the testator meant to dispose of the whole. They perhaps add to the probability created by the passage at the outset of the will which I mentioned; but I think that they do not proceed beyond a ground for conjecture, and are certainly not strong enough to control what I consider the plain and unambiguous expressions by which the testator has explained what he means by the word "capital," explained only by limiting. My opinion, therefore, is, that there is not in this will sufficient to justify the Court in coming to the conclusion that any beneficial interest in the 3l. per cent consolidated annuities in this country was affected by it. I agree with the Vice-Chancellor.

THE LORD JUSTICE TURNER. — The amount of the property depending upon the result of this litigation has led to a very long, and certainly a most ingenious and able argument; but I confess that from the first opening of the case I have thought the question free from all reasonable doubt. If an intention to give property by will could amount to a gift of the property, no doubt the appellants might succeed in their contention, because it cannot be

denied that this will indicates at the commencement of it an intention on the part of the testator to dispose of the whole of his property. * But intention alone is not sufficient to * 421 amount to a disposition of property ; words must be found to carry the intention into effect.

Now it has hardly been contended, although I believe it was advanced slightly in argument, that there are any words in this will, which, *per se*, would effectuate the purpose which is said on the part of the appellants to have been intended, to pass 60,000*l.* or 70,000*l.* 3*l.* per cent consolidated annuities, of which the testator was possessed at the time of his death. The contention, so far as it is advanced, I must say is utterly hopeless. To say that the words "my capital in ready money, or the capital which shall remain with me after my death in ready money and in bank billets belonging to me," will pass consolidated bank annuities, would be to make a will for the testator, and not to expound the will which the testator has made. Upon that argument, therefore, I think no reliance can be placed.

The real argument that has been pressed on the part of the appellants is this: It is said that the testator, at the commencement of this will, has indicated an intention to dispose of the whole of his movable and immovable property, and that at the termination of his will he has made a statement that he has disposed of the whole of that movable and immovable property, and that this commencement and this termination of the will put a construction upon the intermediate part of it, in which the language is said in argument to be ambiguous. The argument thus put involves two points: first, that the ultimate clause in the will does state that the testator has made a disposition of the whole of his movable and immovable property ; and, secondly, that the words of the intermediate disposition are ambiguous, and are open to the extended construction for which the appellants contend.

* I differ from the appellants on both these points. I think * 422 that the latter clause of this will does not state or contain any statement that the testator has made a disposition of the whole of his property. It amounts, as I read it, to no more than this, a declaration that nobody is entitled to interfere with the dispositions which he, the testator, has made by his will ; but it does not at all amount to a statement that these dispositions embrace the whole of the testator's property. I pass by the observation with

reference to the words "my property," which my learned brother referred to, in the clause immediately preceding that upon which I am about to comment, because it was stated in the course of the argument that that was understood to apply to the immovable property only, and that it appeared upon the construction of it to have been plainly so intended. The clause on which reliance is placed is this, "therefore any other disposal made previous to this one concerning my movable and immovable property" (apparently showing that the testator had made before some disposition of some portion of his property), "by whatever papers and acts such might be found, or by whomsoever produced, shall be considered as of no effect, null and void, and as of no power, and that such papers and acts shall not be accepted from anybody, and that no disposal or proceeding shall be effected according to them; and as all my movable and immovable property is mine own and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever, and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors." It is quite clear to my mind that this is not a statement that he has disposed of the whole of his property: it is a statement merely that nobody has

a right to interfere with those dispositions he has made, and * 423 cannot operate to extend the disposition which * had been previously made. It was said in argument that the recital of having given the property would of itself amount to a gift; and no doubt, in several cases, it may;¹ but here there is no recital of his having given the property—there is no statement in this clause of any gift which had been previously made, except the general statement that the testator has made dispositions; and it would be of dangerous consequence to hold that the whole of a man's property is to be taken to be given in a particular way, because he says in the latter part of his will that he has previously disposed of portions of it. I think, therefore, the argument derived from the last clause of the will fails.

Then, as to the intermediate clause, I think the appellants' argument goes far beyond what the words of the will would at all warrant. It is said that that clause is ambiguous. I have always understood that the words of a will are to be taken in their ordi-

¹ See *per* WIGRAM V. C., in *Adams v. Adams*, 1 Hare, 540; 1 *Jarman Wills* (3d Eng. ed.), 490-493.

nary sense and according to their ordinary construction and meaning, unless a very strong context be found to alter the ordinary construction and meaning. Now here the gift is merely a gift of all "the capital which shall remain with me at my death in ready money and bank billets." These words can carry only that which does remain in ready money and in bank billets, unless you can find a clear context in other parts of the will showing the intention to put a different meaning upon the words "ready money and bank billets." If you had found in this will a description of ready money, as including other property than that which the words of the will naturally imply, no doubt you might interpret the words "ready money" in this clause as bearing the interpretation which the testator had himself put upon them. But no such thing is to be found in this will; on the contrary, the context of the will seems to me to show that the testator was really dealing with * that which the words of themselves import that he * 424 was dealing with, for he has plainly classed together ready money and bank billets — bank billets being, as I understand, credit upon banks of money deposited by him with those banks. He was looking, therefore, to funds immediately available, and the purposes for which the funds are to be applied show that he was so looking. In order to answer the first purpose of his will, the two-tenths of this property are to be applied to pay the expenses of his funeral. Is it the least probable that this testator could intend by the description of "ready money and bank billets" — the property which would be immediately available for the purposes to which it was to be applied — that he could intend to pass 60,000*l.* or 70,000*l.*, or whatever the amount may be in the funds in this country, in order that it might be applied as to a portion of it for the purpose of his funeral? And then, again, as you proceed with the will, you find the testator constantly speaking of the sum that would remain, and his wish that this sum might be employed for the particular purposes of charity which he indicates by his will. It seems to me, that the whole context of this will is against the construction which is contended for on the part of the appellants; I feel no doubt that the decision of the Vice-Chancellor is entirely correct, and this appeal therefore must be dismissed, and, I think, with costs.

1860. February 16, 21. Before the LORDS JUSTICES.

A testator bequeathed his residuary estate upon trust to pay the dividends to his cousin for life: and as to the principal from and after her decease, in trust for all her children who should be living at her decease, and the issue of such of them as should then be dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class as if by representation, and not as individuals. *Held*, by Lord Justice KNIGHT BRUCE (Lord Justice TURNER doubting), that the issue of a child who died in the cousin's lifetime were a class to be ascertained at her death; and *held* by Lord Justice TURNER that the class, however ascertained, were to take as joint tenants.¹

THIS was an appeal from the decision of Vice-Chancellor Wood allowing a demurrer, and the question arose upon the construction of the will of Joseph Gibbons, dated the 28th of December, 1841, whereby he gave all the residue of his real and personal estate unto and to the use of the defendants William Clarke and Matthew Dobson Lowndes, their heirs, executors, and administrators, according to the nature thereof, upon trusts for sale. The trusts of the proceeds of the sale were thus expressed: "Upon trust to pay the dividends and interest thereof unto my cousin Ann Livingston, late of Everton and now of Seaforth, both in the county of Lancaster, widow, and her assigns, for the term of her natural life; and, as to the principal, from and after her decease, in trust for all the children of the said Ann Livingston who shall be living at her decease, and the issue of such of them as shall be then dead leaving issue, as tenants in common, but the issue, if more than one, of any deceased child shall take as a class as if by representation, and not as individuals."

The testator died in January, 1842. Ann Livingston, the tenant for life, had several children, one of whom, Ann Potter, died in her lifetime, leaving two children, William and Jane, her only issue her surviving. Jane Potter died in 1845, an infant and unmarried. In July, 1852, Ann Livingston died; and in October, 1852, Wil-

¹ See *Heasman v. Pearse*, L. R. 11 Eq. 522; *M'Gregor v. M'Gregor*, *ante*, 63; *Coe v. Bigg*, 1 N. R. 536; *Hodges v. Grant*, L. R. 4 Eq. 140; 2 *Jarman Wills* (3d Eng. ed.), 177, 178, 237.

liam Potter, by the settlement made upon his marriage, assigned to trustees all the part or share to which * he the * 426 said William Potter, under the will of the said Joseph Gibbons, or otherwise was or might become entitled in the moneys and proceeds then or thereafter to be realized from the sale and conversion into money of the residuary estate of the said Joseph Gibbons.

The trustees of the will paid to the trustees of this settlement the original share of William Potter in the testator's residuary estate, but retained the share to which Jane Potter, if living, would have been entitled.

The bill was filed by the trustees of the settlement, praying a declaration that, according to the true construction of the will of Joseph Gibbons, in the events which had happened, the plaintiffs were entitled as trustees of the settlement of October, 1852, to all such share and interest in the residuary real and personal property of the testator as would have belonged to Jane Potter if she had been living at the death of Ann Livingston, and for a transfer of such share accordingly.

The demurrer was filed by William Potter, who had taken out administration of the estate of his sister Jane, and claimed the share in question as her legal personal representative. The case is reported in Mr. Johnson's Reports. (a)

Mr. Kay, for the plaintiffs, in support of the appeal. — The first question upon this appeal is, what is the class which takes under the gift to the issue of such of the children of Ann Livingston as at her death shall be dead leaving issue? The trust is, that after the death of the tenant for life, the trust fund shall be divided * between all the children of the tenant for life who * 427 should be living at the time of her death, and the lawful issue of any child then dead leaving issue. As to the children living at the death of the tenant for life no question arises. But as to the issue of any child then dead, two constructions are contended for. One is, that the issue of a deceased child who are to take are a class to be ascertained at the death of the tenant for life. The other construction, which is advanced on behalf of the defendant William Potter, as legal personal representative of his sister, would include a child of a child surviving its parent, but

dying in the lifetime of the tenant for life. It is submitted that the former construction is the right one, and that William Potter took all the trust-fund, being the only issue of the deceased child living at the death of Ann Livingston. "Issue of such of them as shall be then dead leaving issue" must be construed as meaning issue of those who shall be then dead leaving issue in existence at the time contemplated; viz., the death of the tenant for life. The testator says distinctly that a child dying without issue in the lifetime of the tenant for life is to take nothing; how, then, can it be maintained that a grandchild surviving its parent and dying without issue in the lifetime of the tenant for life, is to take all the share which its parent would have been entitled to if living at the death of the tenant for life? The issue of a child is to take by substitution in the place of the parent. It follows that the issue are to be living when, and when alone, the failure of the parent causes the substitution to take effect: i.e., at the death of the tenant for life; *Macgregor v. Macgregor* (a) is distinctly in point, and upon this question governs the present case. *Eyre v.*

* 428 *Marsden*, (b) *Bennett v. Merriman*. (c) It is *true that the general rule of law is, not to import a contingency into gifts of this kind; and there can be no doubt, if the gift had been merely to the issue of such child as should be then dead, leaving issue, that the class would include all the children left by the child who died, and would not be confined to the children only of such child who happened to be in existence at the time of the division. That is the general rule. But the question in all the cases has been, whether, in the words of the will, enough can be found — not upon conjectural ground merely — to take the death of the tenant for life as the period for ascertaining the class, and not the death of the *stirps*, concerning whose issue the question arose. It is submitted, that upon the words of this will there is enough to confine the gift to the issue in existence at the death of the tenant for life. *Barker v. Barker*. (d)

The other question upon the appeal is, whether, if the Court should be of opinion that the issue of a deceased child who are to take their parent's share are those in existence at the death of the *stirps*, and are not to be confined to issue in existence at the death of the tenant for life, such issue take as tenants in common or as

(a) 2 Coll. 192.

(c) 6 Beav. 360.

(b) 2 Keen, 564; 4 Myl. & Cr. 231.

(d) 5 De G. & Sm. 753.

joint tenants. It is submitted that, in that case, William and Jane Potter took as joint-tenants; and that the words "as tenants in common" apply only to the children living at the death of Ann Livingston, and the issue of children who shall be then dead, so that the children and issue are to take as tenants in common, as between the classes, but not to the issue of deceased children *inter se*. This construction is strengthened by the words "as a class and not as individuals." *Bridge v. Yates*, (a) *Amies v. Skillearn*. (b)

* *Mr. Robinson*, in support of the demurrer. — The chil- * 429
dren of the child of Ann Livingston who died in her lifetime, who are to take the share of such child, are the children living at the death of such child. There are authorities to show that the class to be substituted for their deceased parent are to be determined at the death of such parent, and that merely from the fact of a contingency being expressed as to the benefit given to the parent the Court cannot import the same contingency into the gift to the children substituted for the parent. *Stanley v. Wise*, (c) *Mair v. Quilter*, (d) *Lyon v. Coward*, (e) *Barker v. Barker*, (g) *In re Bennett's Trust*. (h) The case of *Eyre v. Marsden* (i) has no bearing upon the present case. The question there arose upon a clause of accruer, and was whether the construction to be put upon it should follow the construction of the original gift, and it was held that it should, because the clause referred to such gift; but no question like that in the present case was there raised as to the original gift. In *Bennett v. Merriman*, (k) the decision went upon the ground that the gift was in the direction for transfer and payment only; but in *Lyon v. Coward*, (e) where the gift was in similar terms, the Vice-Chancellor of England did not accede to a similar argument. In *Bennett v. Merriman*, (k) and *Macgregor v. Macgregor*, (l) the decisions turned upon the special wording of the particular wills under consideration. *Smith v. Palmer*. (m) Secondly. William and Jane Potter took as tenants in com-

(a) 12 Sim. 654.

(b) 14 Sim. 428.

(c) 1 Cox, 432.

(d) 2 Y. & C. C. C. 465.

(e) 15 Sim. 287.

(g) 5 De G. & Sm. 753.

(h) 3 K. & J. 280.

(i) 2 Keen, 564; 4 Myl. & Cr. 231.

(k) 6 Beav. 360.

(l) 2 Coll. 192.

(m) 7 Hare, 225.

mon, and not as joint tenants. The words here are
 * 430 * stronger than those in *Bridge v. Yates (a)* and *Amies v.*

Skillern. (b) The words "tenants in common" apply to all those who are to take under the clause, the latter words "shall take as a class, as if by representation, and not as individuals," affecting the quantity, and not the quality, of the interest to be taken by the issue.

Mr. Kay, in reply.

Judgment reserved.

February 21.

THE LORD JUSTICE KNIGHT BRUCE. — Ann Livingston, mentioned in the will of her cousin, the testator in this cause, is dead, having survived him, and having also survived both her daughter Ann Potter, and Jane Potter, the daughter of Ann Potter. The death of Jane Potter happened after the testator's decease, and also after the decease of Ann Potter. There were several children of Ann Livingston who survived Ann Livingston. It does not, I think, appear whether Ann Potter survived the testator, nor do I consider it material whether she survived him or not. The counsel on each side in the case have concurred in stating to us that, except the passage of the will which is quoted in the bill, there is nothing in the will or the codicil to it that bears on the controversy in the suit, which is whether, in the circumstances that I have mentioned, Jane Potter took any vested share or vested interest under the will. I think, differing most respectfully on the point from the able judge before whom the cause has been, that she did not. In this will the word "issue" must, as I conceive, be read as meaning "issue," and not as meaning merely "child"
 * 431 or "children;" nor * is the passage beginning with the words "but the issue if more than one" to be disregarded. It appears to me that the context requires us to read the words "issue of such," which precede that passage, as equivalent to "issue then living of such," and that the demurrer should be overruled. It was admitted by each of the learned counsel that Jane Potter did not leave any issue.

(a) 12 Sim. 645.

(b) 14 Sim. 428.

THE LORD JUSTICE TURNER. — I am well satisfied with having reserved this case for judgment, for upon considering the will and the cases which were referred to during the argument, and others bearing upon the question, I am by no means convinced that the impression which I entertained at the hearing, that the interests of the issue of the deceased children were contingent, was correct. On the contrary, I rather lean to the Vice-Chancellor's opinion that they were vested. The gift is a gift of the residue of the real and personal estate, &c. [His Lordship read the terms of the gift from the will.] This appears to me to be a gift to a body consisting of two classes — the surviving children and the issue of the deceased children — and I do not see why, because the gift to the first member of the body is contingent, the gift to the other member of the body should be held to be contingent also; or why the issue should not be held to have taken vested interests, as they would, as I apprehend, have done, had the gift been to them alone. I do not, however, mean to give any final opinion upon the point. It is not I think necessary to do so, and the state of the authorities certainly is not inviting.

I think that, upon the true construction of this will, there was a tenancy in common, only between the different members of the whole body, and that the members * of the second part of * 432 the body took *inter se* as joint-tenants, and upon this ground I venture to dissent from the Vice-Chancellor, and am of opinion that the demurrer ought to be overruled.

MURRELL v. GOODYEAR.

1860. February 21, 23, 24. Before the LORDS JUSTICES.

The assignees of an insolvent put up for sale an estate, which had been impressed with the character of personalty, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the courtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir, abruptly gave notice to determine the contract,

and immediately afterwards bought up the title of the heir. *Held*, that he could not avail himself of this purchase to defeat his contract, but that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir.¹

Seemle, a vendor who *bond fide* puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title.²

If a purchaser is entitled at all to insist that the vendor's having only a partial interest makes the contract void, he must insist upon the objection at once, and cannot avail himself of it after having treated the contract as good, and required the concurrence of the persons who can complete the title.³

R.'s wife was owner of a remainder in fee, and had issue by *R.* *R.* took the benefit of the Insolvent Act in 1850, and a vesting order was made. The remainder came into possession in 1853. In 1854, *R.* and his wife made an equitable mortgage of the estate to *C.*, who had notice of the insolvency. In 1855 the wife died, and *R.* became tenant by the courtesy. No further proceedings having been taken to perfect the title of the assignees: *Held*, in a suit by the assignees for specific performance, that the question whether *C.* had not a valid charge on the estate by the courtesy was sufficiently doubtful to entitle the purchaser to require *C.*'s concurrence, although a decree for a conveyance to the assignees had been made in another suit, to which *C.* was a party, in which, however, this point did not appear to have been distinctly put in issue.⁴

¹ See 1 Sugden V. & P. (8th Am. ed.) 355; Westall v. Austin, 5 Ired. Eq. 1; Kindley v. Gray, 6 Ired. Eq. 445, cited in note below; 2 Dart V. & P. (4th Eng. ed.) 1095.

² In *Dresel v. Jordan*, 104 Mass. 415, it is said that "the equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by an offer to fulfil by the purchaser, and a request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of the agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration." See *Barnard v. Lee*, 97 Mass. 92; *Richmond v. Gray*, 3 Allen, 25; *Tyson v. Smith*, 8 Texas, 147; *Jones v. Taylor*, 7 Texas, 240; *More v. Smedburgh*, 8 Paige, 600; *Reeves v. Dickey*, 10 Grattan, 138; *Purcell v. McCleary*, 10 Grattan, 246; 1 Sugden V. & P. (8th Am. ed.) 264, note (a') Where the vendor has the right to complete his title, the vendee gains nothing by anticipating him and perfecting it for himself. *Westall v. Austin*, 5 Ired. Eq. 1; *Kindley v. Gray*, 6 Ired. Eq. 445.

³ See 1 Sugden V. & P. (8th Am. ed.) 355; 2 Dart V. & P. (4th Eng. ed.) 970; *Fry Specif. Perfm.* (2d Am. ed.) 201, §§ 293, 475, 876.

⁴ See 1 Sugden V. & P. (8th Am. ed.) 385, 386, and notes, 392; 2 Dart V. & P. (4th Eng. ed.) 1009; *Fry Specif. Perfm.* (2d Am. ed.) 347, § 573.

THIS was an appeal by the defendant Goodyear from a decree of Vice-Chancellor STUART, ordering specific performance of a contract entered into by him for the purchase of a certain real estate called the Moss Hall estate.

In December, 1831, by indentures of lease and release * and covenant to surrender made between Charles Friend * 438 of the first part, Frances Friend, and William Thomas Roper, and Mary Elizabeth his wife of the second part, and John Alpe and Thomas Butterworth of the third part, Charles Friend mortgaged an estate called the Moss Hall estate, situate in Middlesex, to Alpe and Butterworth, for securing to them the repayment of the sum of 1200*l.*, which had been advanced by them to him. Of this estate the greater part was of freehold tenure, and a comparatively small portion copyhold.

The 1200*l.* thus invested was a sum held upon the trusts of the will of Robert Alpe deceased, who had bequeathed this sum to John Alpe and Thomas Butterworth upon trust, "to put out and place the same at interest, upon government or real security," with powers to vary investments, and directed them to pay the income to his daughter Frances, the wife of Charles Friend, for life, for her separate use, with a restraint upon anticipation. After her decease the trustees were to hold the trust-fund upon trust for her children, as therein mentioned. The testator had died shortly after the date of his will. His daughter Frances Friend had survived him, and had an only child, Mary Elizabeth Friend, who had attained the age of twenty-one, and had become the wife of William Thomas Roper.

Charles Friend became a bankrupt in July, 1833. Alpe and Butterworth, with the consent of Frances Friend and of Roper and his wife, obtained the usual order of the Court for the sale by auction of the mortgaged property, and they further obtained leave to bid. When the property was put up for sale, Alpe and Butterworth were declared the purchasers of it for 1020*l.* The purchase was completed in 1835 by indentures, by which the freehold and copyhold parts of the * estate were conveyed and cove- * 434 nanted to be surrendered respectively to the use of Alpe and C. Biggs (a new trustee) in fee, upon such or the like trusts as in and by the will of Robert Alpe were expressed, declared, and contained of and concerning the sum of 1200*l.* thereby bequeathed, or such of them as were then subsisting and capable of taking

effect, or as near thereto as the different natures of such respective hereditaments and premises would permit; it being thereby declared to be the intent and meaning of the parties thereto that the said freehold and copyhold hereditaments and premises should stand in the place of the said 1020*l.*, part of the said capital sum of 1200*l.*, and that the rents and profits of the same estate should be paid and payable in like manner as the interests, dividends and annual produce of the same 1200*l.*; and the said freehold and copyhold hereditaments were to be considered and taken as personal estate accordingly. Alpe and Biggs were in the following year duly admitted to the copyholds.

By an indenture dated the 24th of March, 1843, made between Frances Friend of the first part, William Thomas Roper, and Mary Elizabeth his wife of the second part, and William James Norton of the third part, and duly acknowledged by Mrs. Roper under the Fines and Recoveries Act, Mrs. Friend and Mr. and Mrs. Roper purported to convey the estate to W. J. Norton, upon trust for securing the repayment of 292*l.* lent by W. J. Norton to Roper, the trust for reconveyance after the debt had been satisfied being as follows:—

“Upon trust that the said William James Norton, his heirs or assigns, shall upon the request and at the expense of the said Frances Friend and William Thomas Roper and Mary Elizabeth his wife, or the heirs or assigns of the said Mary Elizabeth
 * 435 Roper, reconvey and * reassign the said freehold and copyhold hereditaments and premises unto the said Frances Friend and William Thomas Roper, and Mary Elizabeth his wife, and the heirs and assigns of the said Mary Elizabeth Roper, according to their respective estates and interests therein.”

On the 4th of December, 1850, Roper filed his petition in the Court for the Relief of Insolvent Debtors. The plaintiff Henry Edward Murrell was chosen as the creditors' assignee of his estate on the 25th of January, 1851, Samuel Sturgis, one of the defendants to this suit, being the official assignee; and on the 15th of February following an order was made, whereby all the estate and effects of Roper were vested in the assignees.

On the 7th of January, 1853, Mrs. Friend died.

By an indenture dated the 4th of February, 1854, Roper and

wife agreed with John Clements to execute to him a valid legal mortgage of their interest in the Moss Hall estate, for securing to him the repayment, with interest, of 180*l.* which he had advanced to Roper. This deed was not acknowledged by Mrs. Roper, nor registered, nor was any mortgage ever made in pursuance of it. At the date of its execution, Clements had notice of the insolvency of Roper.

In March, 1855, Mrs. Roper died, leaving her husband surviving; and he, on the 26th of September following, took out letters of administration to her estate.

The principal moneys and interest secured by the indenture of the 24th of March, 1843, having been paid off out of the rents, and William James Norton, the mortgagee, having died in the mean time, leaving William * Hebler Norton his devisee * 436 and executor, the plaintiff, in April, 1857, applied to W. H. Norton to convey the Moss Hall estate to the plaintiff and Sturgis, which W. H. Norton declined to do, on the ground of a notice which he had received from Clements, who claimed to be entitled under the instrument of the 4th of February, 1854, to a conveyance of the property to himself by way of mortgage. A bill was thereupon filed by the present plaintiff against W. H. Norton, Roper, Clements, Charles Biggs (who had survived his cotrustee John Alpe), and Samuel Sturgis as defendants, praying for a conveyance by Norton of the mortgaged premises to the plaintiff and Sturgis. On the 19th of March, 1858, the Master of the Rolls made a decree declaring that Clements was not, by virtue of the indenture of the 4th of February, 1854, entitled to any priority over the plaintiff and Sturgis, as the assignees under Roper's insolvency, and that they were entitled to a reconveyance, surrender, and assignment of the hereditaments and premises comprised in the indenture of the 24th of March, 1843: directions were given consequent upon these declarations, and Clements was ordered to pay the plaintiff his costs of the suit.

In pursuance of this decree, Biggs and Norton, by an indenture dated the 14th of June, 1858, conveyed the freeholds, and covenanted to surrender the copyholds, to the plaintiff and Sturgis in fee.

The Moss Hall estate was mentioned by Roper in his schedule filed by him in the Insolvent Court in 1850, his statement being that his wife would be entitled to it on the death of her mother.

In July, 1858, an order was made by the Insolvent Court for a sale of the estate. Particulars of sale were prepared, in which the property was described as being "a valuable freehold and small part copyhold estate, comprising, &c., and adapted for * 437 'building purposes ;" and it was subsequently stated that "the whole is freehold, except about three roods and thirty-nine perches, which portion is copyhold."

The sale took place by auction on the 26th of August, 1858. The fifth condition of sale commenced with this statement: "In the year 1843, the property stood limited to trustees in fee in trust for Frances Friend for life, for her separate use, without power of anticipation, and after her decease in trust for her daughter and only child Mary Elizabeth, then the wife of W. T. Roper." The rest of the condition is immaterial for the present purpose.

The sixth condition commenced with, — "The property is derived through W. T. Roper, as administrator of his wife Mary Elizabeth," and proceeded to preclude the calling for certain evidence as to matters of pedigree.

The tenth condition stated that the vendors were assignees of W. T. Roper, and that the purchasers were to have no covenants, except the usual several covenants that the vendors had done no act to encumber.

The conditions provided that the purchase should be completed on the 29th of September, and the not unusual condition, entitling the vendors to rescind in the event of any objection being taken which they should be unable or unwilling to remove, was inserted.

The defendant Goodyear was declared the purchaser, at the price of 1400*l.* ; upon which he signed a contract for the purchase, and paid 140*l.* as deposit.

The only objection taken to the title which requires notice * 438 was the fifth, which was in these terms: "By * the 3 & 4

Will. c. 74, a married woman, by deed acknowledged, is enabled to dispose of any interest, charge, lien or encumbrance in, upon, or affecting lands or money raised, or to be raised, thereout (a). The wife, having conveyed the land by deed acknowledged, pursuant to her statutory power, would appear to have elected to treat it as land, and limit it accordingly (subject to mortgages) to her heirs and assigns. Consequently, unless some sufficient authority to the contrary can be shown, the purchaser will require

(a) Sects. 1 & 77.

the concurrence of her heir-at-law and mortgagee (Clements) and her husband. Was Mrs. Roper's heir-at-law made a party to the suit (*Murrell v. Norton*), or served with a copy of the decree?"

In the reply to this requisition it was admitted that Mrs. Roper's heir-at-law had not been a defendant to the suit nor been served with the decree. Much correspondence followed, and on the 19th of October the purchaser's solicitor wrote to the vendors' solicitors the following letter:—

"The further answer lately given by you to the fifth requisition not having been considered satisfactory by the gentleman who advised upon the title, I could not allow my client, although a willing purchaser, to accept such a title as satisfactory: but previously to peremptorily declining to do so, I thought it advisable to submit the abstract to one of the most eminent conveyancers of the day. I have this morning received his opinion, in which he advises that the title to the fee is vested in the heir-at-law and customary heir of Mrs. Roper, and that the purchaser cannot be advised to accept the title. The fifth requisition, therefore, as originally made, must be strictly complied with, and the concurrence of Mrs. Roper's heir-at-law, *her mortgagee * 439 Clements), and Mr. Roper be obtained."

On the 23d of October, the solicitor of the defendant Goodyear wrote to the solicitors of the vendors as follows:—

"I shall be glad to be favoured with your intentions, as my client has instructed me to apply for a return of the deposit. With regard to the rent, I presume you have claimed it on the part of the assignees, or as owners of the fee, and entitled to the property. This position of course I cannot admit; but as I wish to deal frankly in the matter, I will at once state that, if you can prove to me the marriage of Mr. and Mrs. Roper, and birth of issue, under circumstances which would constitute Mr. Roper tenant by the curtesy, his interest as such tenant by the curtesy, would, I am advised, have passed to the assignees under the insolvency. I will, upon being satisfied that he ever had such an interest in the property, advise my client to consent to a deduction of the amount of the rent due out of the deposit money, upon the balance being handed over to him. This is the only interest

which, I am advised, Mr. Roper, and consequently his assignees, can be entitled to in the premises, and this offer is entirely without prejudice to any course which may hereafter be adopted in case it is not accepted. If it cannot be shown that Mr. Roper was tenant by the curtesy, then I must request an immediate return of the deposit."

And again on the 26th of October, Goodyear's solicitor wrote as follows:—

"I really must request your determination in this matter, as, unless the deposit is forthwith returned, my instructions are peremptorily to commence proceedings for its recovery, and
* 440 in such proceedings I shall seek to * make your clients personally responsible for costs. Be good enough to favour me with a reply in the course of the day."

No answer having been received, Goodyear's solicitor, on the 27th of October, wrote as follows:—

"Not having received any reply from you to my letters of the 23d and 26th instant, I beg that you will consider this as a notice on the part of Mr. Goodyear, that he hereby rescinds the contract for purchase entered into by him, and requires an immediate return of the deposit, 140*l.*, paid by him, and that unless the same is returned to him in the course of to-morrow, legal proceedings will be commenced for the recovery of it without any further notice."

Some further communications, however, took place, the solicitors for the vendors having informed the solicitor of the purchaser that they were waiting for the opinion of counsel on which they should act. On first November, the purchaser's solicitor wrote, "I have been expecting to hear from you herein in consequence of what passed when I last saw you. Be good enough to favour me with your determination as to the return of the deposit, that I may act accordingly." The solicitor of the vendors replied on the same day, "We cannot understand your almost daily applications to us herein, more particularly your favour of this morning's date, after the interview we had with you the latter part of this week, and we can only repeat what we informed your clerk at that interview; viz.,

that we had no doubt as to the goodness of the title, but that we intended, previous to writing you in reply to your numerous letters, taking the opinion of the most eminent conveyancer of the day, and that as soon as we obtain his opinion we should let you know * the course we intended to adopt; we have not yet * 441 obtained that gentleman's opinion, but as soon as we do, you may rely upon hearing from us."

On the 10th of November, the plaintiff's solicitors were advised that the estate probably had become realty, and that a conveyance from the heir should be obtained. They made inquiries for the purpose of ascertaining who was such heir, and having discovered W. T. Roper the younger, they wrote to him on the 15th, with a view of making an appointment with him. They were obliged to delay seeing him, but ultimately an appointment was made with him for the 8th of December. On the 7th of December, however, the plaintiff having occasion to call on the defendant Goodyear, was informed by him and his solicitor, that Goodyear had purchased the interest of the heir-at-law. It appeared that Goodyear, through his solicitor, had opened a negotiation with the heir on the 16th of November, for the purchase of his reversion in fee. Terms were arranged; and by an indenture, dated the 25th of November, 1858, W. T. Roper the younger, in consideration of 200*l.*, conveyed the estate to the defendant Goodyear, subject to the life-estate of William Thomas Roper the father. Upon this the solicitor of the assignees, on the 13th of December, 1858, wrote to the solicitor of the defendant Goodyear, insisting on the right of the assignees to specific performance, allowing Goodyear the expenses of his purchase from W. T. Roper the younger. Goodyear declined to do more than purchase from the assignees, at a valuation, Roper's estate by the curtesy, and shortly afterwards the bill in this suit was filed, praying specific performance of the contract, and that the defendant Goodyear might be declared a trustee of the reversion for the plaintiff and for the official assignee, Mr. * Sturgis, who declined to be joined as co- * 442 plaintiff. Vice-Chancellor STUART having made a decree for specific performance, allowing Goodyear the purchase-money he had paid for the reversion, with his expenses of the purchase, Goodyear appealed.

Mr. Malins and *Mr. Welford*, for the plaintiff, in support of the

icipation ; and after her decease, in trust for her daughter
 * 445 and only child Mary Elizabeth, then the * wife of William

Thomas Roper, which would have led to the inference that it was real estate in the lady ; but the sixth condition of sale says (and this may seem singular to a person not acquainted with the facts) that the title to the property is derived through William Thomas Roper, as administrator of his wife Mary Elizabeth, directly contradicting the *prima facie* inference derivable from the fifth condition of sale. Whether the property was impressed with the character of personalty, or was in every sense realty, I am perfectly satisfied that the assignees acted with honest intentions in preparing the conditions of sale as they did, and in offering the property for sale as they did ; I am satisfied that they believed themselves to be absolute proprietors of the estate as assignees, and that they sent forth those conditions to the world, as I have said, fairly ; whether they were mistaken or not is another question ; but the question is one as to which a reasonable man, though acquainted with the law, might well fall into a mistake either one way or the other. Under these conditions of sale the property is sold. The objections to the title are required to be delivered in a certain time after the delivery of the abstract, I think in fourteen days (they were delivered, I think, on the 10th of September), and then this objection is taken, and it becomes to some extent the subject of discussion. The vendors address themselves to the consideration of it, and while the matter is going on, a letter of the 23d October is written by the purchaser's solicitor. [His Lordship here read the letters of the 23d, 26th, and 27th of October.] Now, if there had been any thing unfair in the conduct of the vendors, it is very probable that Mr. Mardon, the solicitor of the purchaser, might have been right in this contention ; but I have already said that in my opinion there was a total absence of fraudulent or improper intention. The 12th condition of sale,

* 446 which looks to the possibility of a * defect in the title, says,

“ The purchaser is to make his objections and requisitions, if any, in respect of the title, and to send the same within fourteen days from the day of the delivery of the abstract ; and in default of any such objection, he shall be deemed to have accepted the title ; and if he shall insist upon any objection or requisition on the abstract, or title, or evidence of the title and conditions, which the vendors shall be unable or unwilling to remove or comply with,

the vendors may rescind." Independently, therefore, of the ordinary course of business with regard to the purchase of real estates in the present condition of the law of the country, here is a condition of sale which pointedly refers to the possibility of the title being found defective; and I am of opinion that the vendors were entitled, as between them and the purchaser, to a reasonable time for making the title good. The purchase was not in any event to be completed before the 29th of September. The possibility of the title not then being completed is provided for by another condition of sale with regard to the interest running, whatsoever the cause of delay. I think, therefore, that whether the letter of the 27th of October is considered alone, or taken in connection with those that preceded it, to rescind the contract by it was a step which the purchaser was not entitled then to take. What, then, was the purchaser to do? The question was, whether the assignees had an absolute interest, or had only an interest during the life of the insolvent — then, and, I believe, still alive, — in which event the reversion in fee would belong to his son as the heir-at-law of his mother. In this state of things the purchaser, who seems to have acquired his knowledge of the interest of the son merely by means of the abstract, and of having been the purchaser, enters into a negotiation with the father and son, or one of them, for the purchase of the son's interest. He purchases it and takes a conveyance * of it, dated the 25th of November, 1858, a * 447 month after the letter of the 27th October, which I have read. The conveyance, after recitals made necessary or rendered relevant by the state of the title, proceeded thus: —

“ And whereas the said Frederick Goodyear has objected to the said title of H. E. Murrell and S. Sturgis, and the said Frederick Goodyear contends that, under the circumstances hereinbefore appearing, the said trust fund or sum of 1200*l.* bequeathed by the will of Robert Alpe, has been converted into realty, and consequently that the said William Thomas Roper the elder, upon the death of the said Mary Elizabeth his wife, only became entitled to the said freehold and copyhold hereditaments for an estate therein for his life; and that, subject to such estate by the curtesy in him, the said hereditaments descended to the said William Thomas Roper the younger for an estate of inheritance in or as of fee-simple; but the said Henry Edward Murrell and Samuel Sturgis

insist that they are entitled to the said hereditaments for an estate in or as of fee-simple in possession, and the said question of title is now depending between them and the said Frederick Goodyear; and whereas the said Frederick Goodyear has offered to purchase all the estate and interest, right and title, of the said William Thomas Roper the younger of and in the said hereditaments, and the said William Thomas Roper has agreed to sell his right for the sum of 200*l*."

It is the benefit of a bargain thus effected for the purpose of destroying the original contract, or preventing the possibility of its fulfilment on the part of the original vendors, that the original purchaser insists on. My recollection does not furnish me with an instance similar to the present. Whether, if the original purchase shall ultimately go off for want of ability to make a title or procure a conveyance, Mr. Goodyear will be a trustee of this property for the assignees, they paying him what it has cost him, I will
 * 448 * express no opinion, but that if the original contract shall go on, he must be considered as having made this purchase for the purpose of relieving the title from the objection (as far as that objection goes) I have not the least doubt; the purchaser being entitled to have the money which he paid to Mr. Roper the younger allowed him with interest and all the reasonable expenses incident to the purchase and conveyance from that gentleman.

The only other objection is that relating to Clements's mortgage. Though it may be only a question of conveyance and not of title, it is for the benefit of both parties that it should be disposed of now, and on this head we both of us wish to hear a reply.

THE LORD JUSTICE TURNER. — This case, to the extent to which we are now dealing with it, seems to me to be abundantly clear. It is simply a question of specific performance which must depend upon this, whether there was an agreement subsisting at the time of the institution of this suit, which it was right for this Court to enforce. That there was originally such an agreement is not disputed. Whether it is subsisting and ought to be enforced seems to me to depend upon two points. First, whether the defendant, the purchaser, is to be relieved from the agreement into which he entered in consequence of his having got in the title of the heir, and, secondly, whether he has determined the agreement by the

notice which was given by him on the 27th of October, 1858? These are the two questions upon which, as it seems to me, the whole case, so far as we are now dealing with it, must depend.

Now, first, how could the defendant's purchase of the title of the heir-at-law destroy the original contract entered into by him with the plaintiffs for the purchase of * the fee-simple? It * 449 could do so, as I apprehend, only upon one ground, that it removed the subject-matter of the contract; and that, in truth, to compel the defendant to complete the purchase was to compel him to buy and pay for a property which has already become his own by the purchase which he himself had made. Now I am quite aware that this Court has refused to enforce specific performance when persons have entered into contracts for the purchase of property which has turned out to have already belonged to them. But upon what ground has the Court refused to enforce specific performance in such cases? Simply upon the ground of mistake; and in this case there is no mistake, for the defendant, at the time when he made the purchase from the heir, perfectly well knew how the matter stood. He made that purchase with his eyes perfectly open. The whole substratum, therefore, the whole ground for relieving the defendant from the purchase made by him from the assignees, on the ground of the purchase which he has made from the heir, seems to me wholly to fail.

But then it is said, that upon the 27th of October, 1858, notice was given to determine this contract, and that it must be treated as null and void. Now it is to be observed that, with a full knowledge of this objection to the title, the defendant did not, in the requisitions which he made, take the objection, if he was entitled to take it, that the contract was void, upon the ground that the assignees had sold that to which they had no title. All that he said was, "procure me the concurrence of the heir-at-law." He treated the contract, therefore, as a subsisting contract. I do not enter into the question whether he was or was not entitled to say that he would put an end to the contract. I am not by any means satisfied that he was. But supposing him to have been so, he treated the contract as a subsisting * contract at the * 450 time when he made the requisitions upon the title; and not only so, but after discussions between the solicitors with respect to the title down to as late as the 19th of October, 1858, this contract was treated by the defendant as a subsisting contract and the con-

currence of the heir-at-law required. I find, in a letter of the 19th of October, 1858, the defendant's solicitor writing to the plaintiff's solicitors in these terms. [His Lordship read the letter.] So that down to the 19th of October, 1858, this contract is distinctly treated by the defendant as a subsisting contract. Then comes this question: having treated the contract as a subsisting contract down to the 19th of October, can the defendant, on the 23d of October, four days afterwards, turn round and say, "I determine this contract, and require payment back of the deposit which I have paid." I think that every principle, and I may add, every authority, is against the existence of any such right on the part of a purchaser. The defendant was bound to afford to the vendors a reasonable time to enable them to clear the title of this difficulty which existed upon it. I think that by the effect of the letters, and by the dealing upon the contract, the defendant had put the case in the position of an ordinary case between vendor and purchaser. Mr. Langworthy, who argued this case very ably and very clearly, put the case thus: He said, the purchaser is entitled to rescind the contract at once, upon the ground that there has been, not a fraudulent dealing by the assignees in putting up the property for sale, but an attempt by them to sell that to which they must be taken to have known they had no title, — the entire fee. Well, as I said before, the defendant might, if he pleased, have set up that at the time when he sent these requisitions as to the title; but he did not do so. I do not mean to say he could have done so with success. I do not go the length

* 451 Mr. Langworthy carried his argument * upon that point;

I am not prepared to hold that in the case of *bond fide* conduct on the part of a vendor putting up property for sale, in which he has a partial interest, supposing himself to have the entire interest, it is competent to a purchaser to say that the contract shall be no contract, if the vendor is able ultimately to make a title to the property according to the more extended interest he has contracted to sell. I certainly have always thought, that in such a case a purchaser could have no right to resist a specific performance of the contract. But I say, without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this defendant, it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, "I treat this as a subsisting contract," and then

afterwards suddenly turn round and say, "I have a right to revert to my original position. I have a right to destroy that contract, which for months and months, during the whole treaty of negotiation upon the title, I have treated as a subsisting contract." It seems to me, therefore, that the case fails upon this second ground as much as it fails on the first, and that this decree, so far as we have yet dealt with it, is a perfectly good decree.

Mr. Malins, in reply as to Clements's mortgage. — This is a mere question of conveyance, not of title. Clements at most is only an incumbrance.

[THE LORD JUSTICE TURNER. — That is a perfectly good answer to the defendant's objections, if you admit Clement to have a good mortgage which you are bound to pay off; but if you dispute his having a good mortgage, how does the case stand?]

We contend that he has no claim, inasmuch as he is bound by the decree in the former suit * ordering a conveyance to the assignees. That decree we say was well grounded. Roper, before the vesting order, had a freehold during the joint lives of himself and his wife, and had also the chance of an estate by the curtesy, the only contingency being that of his surviving his wife. The falling into possession of that estate by curtesy was nothing more than the perfecting an inchoate right which previously existed and passed by the vesting order. Clements, therefore, who took his security after the date of the vesting order, and with notice of it, acquired no title at all.

THE LORD JUSTICE KNIGHT BRUCE. — Without giving any opinion whether the question upon Clements's mortgage is a question of title or a question of conveyance, and without meaning to give any opinion favourable to Clements's claim, if he should make one, I think the point sufficiently doubtful to preclude the right of the vendors to force the completion of the purchase upon the purchaser without clearing the title from this blot, or cloud, or doubt, or whatever it may be called. I think, however, that whether it is a question of title, or whether it is a question of conveyance, it ought to make no difference in the costs. The main cause of dispute upon which the whole controversy has arisen has been the

claim of the purchaser to be delivered from the contract, upon the ground of an interest supposed to be outstanding in the younger Mr. Roper, and upon the conveyance obtained by the purchaser from that gentleman. With regard to rescinding the contract, the defendant has signally failed ; for there was neither fraud, wilful misrepresentation, wilful suppression, nor unreasonable delay. With regard to the claim made by the defendant to retain the benefit of the conveyance from the younger Mr Roper, he having acquired the knowledge of that interest by the means by * 453 which he did, * I think it a claim of great impropriety, and it would, in my judgment, be wrong as between the parties, and no less wrong as regards the interests of society, not to order the defendant to pay all the costs, both before the Vice-Chancellor and here.

THE LORD JUSTICE TURNER. — I think the question before us now, — the question of Clements's mortgage, — whether considered as a question of title or a question of conveyance, is not clear. As to the decree which has been already made, it was treated in the argument — and I take it for granted correctly — that the point which now arises was not in issue in that suit, the property then being considered as personalty ; now we have dealt with it as realty. Supposing, however, the point to have been in issue, and to have been decided in that suit, the decree is still open to a rehearing. I think the plaintiffs, therefore, fail in establishing their case on the ground of the decree. With reference to the point raised by *Mr. Malins* that there was an inchoate right to an estate by the curtesy at the time of the insolvency, and that this right would belong to the assignees without any subsequent application to the Court, that is a question which, as I understand the case, would depend upon the construction to be put upon the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96 ; and I cannot say that the construction is so clear upon these statutes as to warrant us in holding that the purchaser may not be afterwards exposed to a claim upon the property by Clements, as mortgagee, considering the property as real estate. I think, therefore, the title must be cleared of that difficulty.

With respect to the costs of the suit, I fully concur in the * 454 observations which have been made by my learned * brother.

I think there was a most improper course of conduct on the [348]

part of the purchaser. I do not impute it to him personally, probably he knew nothing about it; but those who advised him seem to me to have advised him to take a course most dishonest and most unjust.

GREEN v. JENKINS.

1860. January 19, 20. February 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

To sustain a bill of review without a discovery of new facts, the decree sought to be reversed must appear to be contrary to some statutory enactment, or some principle or rule of law or equity recognized and acknowledged or settled by decision, or to be at variance with the forms and practice of the Court.¹

Held, by the Lord Chancellor and Lord Justice TURNER, that the Statute 5 Vict. c. 27 (sess. 2), for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices upon farming leases, does not restrict any power of leasing which the incumbent before possessed.

¹ See 2 Dan. Ch. Fr. (4th Am. ed.) 1576; Coop. Eq. Pl. 89. The bill cannot be maintained, where the error is in mere matter of form, or the propriety of the decree is questioned. Story Eq. Pl. § 411; *Tommey v. White*, 1 H. L. Cas. 160; *Haig v. Homan*, 8 Cl. & Fin. 320. It is no ground of review that the matters decreed are contrary to the proofs in the cause. *Mellish v. Williams*, 1 Vern. 166; *Bartlett v. Fifield*, 45 N. H. 81; *Whiting v. United States Bank*, 13 Peters, 6, 13, 14; *Barnam v. McDaniels*, 6 Vt. 177. The bill cannot be sustained on the ground that the Court has decided wrong on a question of fact. *Webb v. Peel*, 3 Paige, 368; *Young v. Henderson*, 4 Hayw. 489; *Dougherty v. Morgan*, 6 Monroe, 153; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110; *Eaton v. Dickinson*, 3 Sneed (Tenn.), 397; *Getzler v. Saroni*, 18 Ill. 511. Questions of fact are not open for discussion on a bill of review for errors in law. *Evans v. Clement*, 14 Ill. 206. The error must appear on the decree and pleadings; for the evidence in the case at large cannot be examined to ascertain whether the Court misstated or misunderstood the fact. *Dexter v. Arnold*, 5 Mason, 303; Story Eq. Pl. § 407; *P. & M. Bank v. Dundas*, 10 Ala. 661. But, taking the facts as they are stated to be on the face of the decree, it must be shown that the Court have erred in point of law. Story Eq. Pl. § 407. If, therefore, the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief on a bill of review, but only by appeal to some superior tribunal. Story Eq. Pl. § 407. It is on this account that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact which support the decree. In the United States Courts the decrees are usually general, without any statement of facts.

THIS was a demurrer to a bill of review, filed by leave of the full Court of Appeal. The bill of review stated the institution by the defendant William James Jenkins of the original suit of *Jenkins v. Green* against the plaintiff, being a suit for the specific performance of an agreement contained in a written memorandum dated the 24th of April, 1855, and made between the Reverend William James Jenkins, rector of the parish of Fillingham of the one part, and Benjamin Green, farmer, of the other part, which was as follows: "The said Reverend William James Jenkins, in consideration of the rents, covenants, and agreements hereinafter covenanted on the part of the said Benjamin Green to be paid, observed, and performed respectively, doth hereby covenant and agree with and to the said Benjamin Green that he will, with the consent of the bishop of the diocese and patrons of the

* 455 advowson and rectory of Fillingham, on or before * the 1st day of July next, grant and execute unto the said Benjamin Green a good and effectual demise or lease, to be prepared and perfected by his solicitor, but at the expense of the said Benjamin Green, of all that messuage, farm house, and farm, containing 437 acres or thereabouts, situate at Fillingham aforesaid, and known as the Glebe Farm, and now in the occupation of Mr. Williamson Glover, except thirty-seven acres thereof, to hold the same, with their appurtenances, unto the said Benjamin Green, from the 6th day of April last, for the term of fourteen years, with liberty to plough up, free of any extra rent, one moiety of a close called Thacker Hill Close, but with a reservation out of demise of timber, mines, and gravel, right of sporting, fishing, shooting, and stocking

See 2 Dan. Ch. Pr. (4th Am. ed.) 1001 *et seq.*, and notes; *Bundine v. Shelton*, 10 Yerger, 41. But, for the purpose of examining all errors of law, the bill, answer, and other proceedings are in our practice as much a part of the record before the Courts as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained. Story Eq. Pl. § 407; *Dexter v. Arnold*, 5 Mason, 311, 312; *Hollingsworth v. McDonald*, 2 Harr. & J. 230; *Webb v. Pell*, 3 Paige, 368; *Whiting v. United States Bank*, 13 Peters, 6, 13, 14; *Ludlow v. Kidd*, 2 Ohio, 372; *Stevens v. Hey*, 15 Ohio, 313; *Saum v. Stingley*, 3 Clark (Iowa), 514; *Bartlett v. Fifield*, 45 N. H. 81; and all these may be looked into to find errors on the face of the decree; *Saum v. Stingley*, 3 Clark (Iowa), 514; *Holman v. Riddle*, 8 Ohio (N. S.), 384. In *Seguin v. Maverick*, 24 Texas, 526, it is said that "as our decrees do not recite the facts, as under the English Chancery Practice, upon a bill of review, the decree can at most be reversed, and not corrected to accord with the facts; therefore a bill of review does not accord with our system."

ponds with fish; yearly rent of 600*l.*, and such further sum as the said lessor will have to pay annually to a drainage company, or to government, for draining the said farm or any part thereof, or for the money borrowed for that purpose, and also a further sum of ten shillings per acre for ploughing one close called the Third Field, and five shillings per acre for the other moiety of the said close called Thacker Hill Close, and also by way of penalty a further sum of ten pounds per acre for every acre of grass land ploughed up, except as aforesaid; rent payable half-yearly; the first half-yearly payment to be made on the 11th day of October next, with proportionate deduction for the interval between the 6th day of April instant and the 13th day of May next, the latter day being the time at which the said tenant will enter. The said William James Jenkins agrees with the said Benjamin Green to obtain the consent of the said bishop of the diocese and of the said patrons of the said living to the said lease; also, if he is able (but this is not compulsory upon him), to get the whole of the said farm, or such part thereof as is required, drained by a drainage company, or by borrowing * money for that purpose, the * 456 said tenant paying the annual payment to the said company or to government for that purpose during the said term of fourteen years. The said lease also to contain the following covenants, stipulations, and agreements. Liberty for said lessor to plant during term not more than ten acres of land; to build six tenements, and for that purpose to take no more than ten acres of land. Tenant to pay all taxes and rates, except landlord's property tax, to put in and keep the whole of the buildings, including farm-house and dove-cot, inside and out, in good and substantial repair, and to paint and cleanse same; to cleanse ditches and keep hedges well cut and plashed, and fences in good repair. Tenant to insure premises in joint names of himself and lessor in a sum not less than 1000*l.*; also to insure stock to value of a half-year's rent and produce policy. In default, landlord to insure and add premiums paid for insurance as additional rent. The money obtained from insurance office, if premises burnt, &c., to be laid out in rebuilding or repairing premises; and if money insufficient, tenant to make up deficiency. Course of husbandry to be the four fields system, and the usual and best improved methods thereof, according to the custom of this country. Special provision for farming during the last year of tenancy, and with full power for

lessor or his tenant to go upon farm, with horses, &c., to do all ploughing and sowing which tenant does not do. Upon request, the said tenant to find stable room for horses, &c. Lessor to have full power to enter and inspect farm and buildings at any time, and also to enter upon farm and house to show it to others. Right of lessor to dig clay on any part of the said farm. Power of distress and entry, if rent unpaid for twenty-one days after due.

Lease to become void, if tenant underlet or assign lease,
 * 457 become insolvent, bankrupt, make an assignment for * benefit of creditors, compound with creditors, or allow goods to be taken in execution, wilfully waste, or not repair after one month's notice given for that purpose. Tenant to supply lessor with ten waggon loads of straw yearly; to lead from Lincoln to Fillingham, or from any place not exceeding ten miles from lessor's residence, twenty-five tons of coal yearly to lessor's residence, upon said lessor giving to said tenant a week's notice of his requiring the straw or coal; the said straw to be supplied and the said coal to be led in such quantities as the said lessor shall from time to time require; and in default said lessor to procure straw and get coals led, and charge same to tenant and add it to rent. Tenant also to supply said lessor with thirty quarters of oats or barley, in such proportions as he may require them, at market price, and lead the same if required. Lessor to give said tenant a week's notice of his requiring the said oats or barley. Lessee not to occupy any other farm without consent of lessor. Said lease also to contain the usual covenants and provisos on behalf of both lessor and lessee. Costs of this agreement to be borne by the parties hereto in equal moieties."

The bill of review then stated the proceedings in the original suit down to the decree, and it set out that decree, dated the 16th of July, 1858, whereby, after referring to the evidence taken in the original suit, including the agreement of the 24th day of April, 1855, and to an undertaking on the part of the plaintiff, by his counsel at the hearing, to obtain an apportionment of the drainage rent-charge, so that no part of the rent-charge payable in respect of any portion of the glebe not comprised in the lease to be granted by the plaintiff Jenkins to the defendant Green, as thereafter directed, should be charged on the land to be
 * 458 included * in such lease, it was declared that the plaintiff Jenkins was entitled to a specific performance of the agree-

ment of the 24th day of April, 1855, and it was ordered and decreed accordingly. And it was declared that the plaintiff Jenkins was entitled to select such thirty-seven acres as he might desire to have excepted from the lease, and also such ten acres as he might desire to have the power of retaining or resuming for the purpose of planting or building, but that such right of selection was to be exercised by him at or before the time of the execution of the lease, and in such manner as not to interfere with any of the clauses in the agreement of the 24th day of April, 1855, or with the beneficial enjoyment by the defendant Green of the lands to be included in the said lease. And it was ordered that a proper lease (having regard to the terms of the agreement and of the foregoing declaration) should be settled, in case the parties should differ about the same. And it was ordered that the plaintiff Jenkins should execute such lease to the defendant Green, and that the defendant Green should execute a counterpart of such lease to the plaintiff Jenkins, and that such lease and counterpart should be at the expense of the defendant Green, and that the costs of the agreement mentioned should be borne by the plaintiff and defendant in equal shares: and the costs of the suit were reserved. And it was ordered that the further consideration of the said cause should be adjourned, and any of the parties were to be at liberty to apply to this Court as there should be occasion. The bill of review then stated the enrolment of the decree on the 11th of December, 1858.

The bill of review further stated that under the decree a lease had been approved of by the Judge in Chambers; and that such lease was between the plaintiff W. J. Jenkins, of the first part; the Bishop of Lincoln, of the *second part; the *459 master and scholars of Balliol College, Oxford, of the third part; and Benjamin Green, of the fourth part.

The bill of review further stated that Benjamin Green objected to the lease before the chief clerk, on the ground that it could not be granted otherwise than according to the provisions of 5 Vict. c. 27 (sess. 2), intituled "An Act for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases;" and that, as the agreement of 24th of April, 1855, was in several particulars, and particularly in the reservation of rent half-yearly instead of quarterly, and in the amount fixed for insurance against fire, contrary and repugnant to the provisions of the said statute, a lease could not be granted

according to the terms of the decree. The bill of review stated the issuing of a summons to vary the chief clerk's certificate approving of the lease, and the adjournment of the summons into Court, and the dismissal thereof on the 16th July, 1859, with 40s. costs, and that an appeal from this dismissal was heard, together with the hearing on further consideration, of the original cause before the full Court of appeal, when, by the order of the Court, the appeal and the hearing on further consideration were ordered to stand over, with liberty to Benjamin Green to file a bill of review within a fortnight.

The bill of review submitted that there was manifest error of law in the decree of the Master of the Rolls of the 16th July, 1858, for that a lease of the glebe farm in the agreement of the 24th of April, 1855, mentioned could not be granted otherwise than according to the terms and provisions of and agreeably to the Act 5 Vict.

c. 27 (sess. 2), and for that the agreement of the 24th of April, * 1855, was in many particulars, and particularly as to the time of payment of the rent, and as to the sum in which insurance against fire was to be effected, at variance with and contrary and repugnant to the terms and provisions of the Act, and therefore that a lease of the farm could not be settled and granted according to the terms of the agreement, nor could such agreement be specifically performed as directed by the decree; the bill of review also insisted that, as the decree directed specific performance of the agreement, and also a lease to be settled according to its terms of agreement, the decree directed a lease to be executed contrary to the provisions of the Act, and was therefore contrary to the statute law of the realm, and that there was error of law apparent on the decree. And the bill insisted that the plaintiff was aggrieved by the decree, inasmuch as if he were compelled specifically to perform the agreement of April 24th, 1855, and, in obedience to the said decree, to execute and accept a lease according to the terms of it, the lease would not be in accordance with, but would be repugnant to, the provisions of the above-mentioned Act, and would not be binding upon the successors of the defendant Jenkins in the rectory of Fillingham.

The prayer was, that the decree of the 16th day of July, 1858, might be reviewed and reversed for error of law appearing therein as aforesaid, and that the bill in the original suit of *Jenkins v.*

Green might be dismissed, or at all events that all further proceedings in such suit might be stayed, and for further relief.

The defendant Jenkins demurred.

Mr. Roundell Palmer and *Mr. Beaumont*, for the defendant Jenkins, in support of the demurrer. — The grounds alleged as the foundation of this bill of *review, viz., that the *461 agreement, if enforced, would be a violation of the statute 5 Vict. c. 27 (sess. 2), and that a lease in accordance with it would not be binding on the successors of the lessor, go to the whole merits of the case, and are more properly the subject for a rehearing, which, however, cannot be had after enrolment, than for a bill of review. Except upon discovery of new matter, a bill of review cannot be brought to try the whole merits of the case, but can be founded only on error of law apparent on the face of the decree, as if an absolute decree be made against a person who, upon the face of it appears to have been at the time an infant. *Mitford's Pleadings*, (a) *Mellish v. Williams*, (b) *Perry v. Phelps*, (c) *Catterall v. Purchase*, (d) *Trulock v. Roby*. (e) But upon the merits alleged, the bill is also demurrable. Though the rent is reserved half-yearly instead of quarterly as required by the statute, and a sum certain is to be paid for insurance instead of a sum in proportion to the value, this does not vitiate the contract. A lease pursuant to the agreement would still be binding as between the landlord and the tenant *Green*. The landlord executing such a lease would not afterwards be at liberty to repudiate it. The provisions in the Statute 5 Vict. c. 27 (sess. 2), that the rent in a lease made under it is to be payable quarterly, and that the amount to be paid for insurance is to be three-fourths of the value, are not made an essential part of the contract, but are mere matters of form prescribed by the statute. The difficulty, even if it existed, may be remedied, for if, under the 4th section of the statute, the bishop and patrons having had the Act called to their attention, now thought proper to execute a lease in the terms agreed *upon, the plaintiff *Green* would get a perfect *462 indefeasible title under the 4th section. Such a lease, even if inconsistent with the provisions of 5 Vict. c. 27 (sess. 2.),

(a) Pages 83, 84 (4th ed.).

(b) 1 Vern. 166.

(c) 17 Ves. 173.

(d) 1 Atk. 290.

(e) 2 Phil. 395.

would be perfectly valid under the rights of leasing given to the incumbent by the common law, modified by the previous statutes on the subject, 13 Eliz. c. 10, and 18 Eliz. c. 11. Those rights are not expressly abrogated by 5 Vict. c. 27 (sess. 2.), and where not inconsistent the several Acts may stand together.

Bacon's Abridgment, (a) Dwarris on Statutes, (b) *Foster's Case*, (c) Coke's first Institute, (d) *Doe d. Tennyson v. Lord Yarborough*, (e) *Watson's Case*, (g) *Crowley's Case*. (h)

Mr. Selwyn and Mr. Alder, in support of the bill. — The error which is to be apparent on a decree in order to support a bill of review does not mean direct error, or error on the face of the decree manifestly inconsistent with the decree as it stands, but it is sufficient if error appear in the body of the decree, and for the purpose of discovering such error you may look not only at the decree, but also at what the decree refers to. *Grice v. Goodwin*. (i) Formerly all the pleadings were enrolled. This is not so now, for according to the order of the 17th March, 1843, no part of the statements, &c., are to be stated in the enrolment. The effect of the Order, however, is not to vary the rights of the suitor, but merely to prescribe a formal practice in the office of enrolments. The suitor may still, as formerly, look at the record in a neighbouring office. There is then, here, error apparent * 463 ent * on the face of the decree, for the decree directs the specific performance of an agreement which, according to the existing law, cannot be legally performed. The error is inconsistency between the terms of the decree and a public statute, and that is error sufficiently apparent to support the bill. The agreement is for a lease under the provisions of the Statute 5 Vict. c. 27 (sess. 2), and the lease, if executed pursuant to the agreement, would not be in conformity with the provisions of the statute. By the agreement the rent is to be paid half-yearly, whereas by the statute, reservation of the rent quarterly is made a condition precedent to every valid lease under the Act. So by the agreement a fixed sum is to be paid in respect of the insurance, while the Act

(a) Vol. 4, pp. 744, 745, 747.

(b) Pages 530, 531.

(c) 11 Rep. 56 a.

(d) 381 a, b.

(i) Prec. Chan. 260; Vin. Abr. Chan. tit. Z.

(e) 1 Bing. 24.

(g) 3 Salk. 25.

(h) 2 Swanst. 1.

prescribes the payment of a sum equal to three-fourths of the annual value. These provisions of the statute are imperative, and their observance is of the essence of the contract, and not a mere formal matter; nor can the Court assume that validity will be given to a lease notwithstanding their violation, by the consent of the ordinary and patron. A lease pursuant to the contract being void as a violation of the statute, cannot be supported as within the rights of the rector or vicar under preceding statutes upon the subject. The 5 Vict. c. 27 (sess. 2), and the preceding statutes, 13 Eliz. c. 10 and 18 Eliz. c. 11, being *in pari materid*, are to be read together. There are stipulations, moreover, in the agreement which are violations of the earlier law on the subject. By that law the tenant could not hold under a lease dispunishable for waste; but by the present agreement he is to be at liberty to plough up grass land on payment of a fine.

They also referred to *Doe d. Tennyson v. Lord Yarborough*, (a) * *Simmons v. Norton*, (b) Story on Equity * 464 Pleadings, (c) *Bailey v. Murin*, (d) *Rex v. Loxdale*. (e)

Mr. R. Palmer, in reply, cited *O'Brien v. Connor*. (g)

Judgment reserved.

February 25.

THE LORD CHANCELLOR.—I am of opinion that, upon the demurrer to this bill of review, there ought to be judgment for the defendant.

The argument at the bar proceeded long on the nature of a bill of review, and the objections to the original decree in respect of which upon a bill of review it may be reversed,—the plaintiff's counsel contending that every error of law to be discovered in the decree, on which it ought to be reversed when appealed against, is sufficient for reversing it on a bill of review,—and the defendant's counsel contending that a bill of review does not apply to the propriety of the decision on the merits, even on points of law, and

(a) 1 Bing. 24.

(b) 7 Bing. 640, 646; Co. Litt. 43 a, 53 b.

(c) Sect. 424.

(e) 1 Burr. 445.

(d) 1 Vent. 244.

(g) 2 Bal. & B. 146.

deals only with what is contrary to the forms and practice of the Court. The latter position does seem to be supported by high authority. Excluding a bill of review on the discovery of new matter since the decree, which, with leave of the Court, may be brought on the whole merits of the case, it is laid down by Lord REDESDALE in his valuable treatise on Pleading in Chancery, (a)

that upon a bill of review "the decree can only be reversed * 465 upon the ground of the apparent * error ; as if an absolute decree be made against a person who, upon the face of it, appears to have been at the time an infant." In *Perry v. Phelps*, (b) Lord ELDON uses language which, as reported, does not very distinctly draw the distinction between the errors of law in the decree which may and may not be taken advantage of upon a bill of review, but which may mean that the bill of review can only reach such errors as the one given by way of illustration by Lord REDESDALE. In *Trulock v. Robey*, as reported in 11 Jurist, 999, Lord COTTENHAM intimates that he considered this to be the opinion expressed by Lord ELDON in *Perry v. Phelps*, (c) and he adds, "I have always understood the law to be as there stated." "Error apparent on the face of the decree is distinguished from matter which may be set right on appeal, as it deals only with what is contrary to the forms of the Court, not with what has relation to the judgment of the Court." But these can only be considered as *dicta* although of the highest authority ; for in *Perry v. Phelps*, (b) Lord ELDON did actually discuss the whole decree,¹ and, deciding that it was right on the merits, abstained from giving judgment on any matter of form. According to the marginal note, all that was there decided on this point was, that "error apparent to support a bill of review must be plain and obvious, not merely an erroneous judgment." And in *Trulock v. Robey*, (d) Lord COTTENHAM likewise entered into the merits of the decree, saying that the Vice-Chancellor was right and that there was nothing like error on the face of the decree.

Examining the authorities which I believe are all referred * 466 to in a very learned note to the report of *Truelock v. Robey*, (e) I do not find it anywhere laid down that any

(a) Page 84 (4th ed.).

(d) 2 Phil. 395 [15 Sim. 265, 276].

(b) 17 Ves. 178.

(e) 11 Jurist, 597 [15 Sim. 265, 276].

(c) Reported in 11 Jurist, 999

¹ See *Evans v. Clement*, 14 Ill. 206.

error in law in a decree which would be sufficient ground for reversing it on an appeal is sufficient to support a bill of review ; but, if those authorities are to be regarded, any error of law apparent on the face of the decree may be taken advantage of by a bill of review. The inclination of my opinion is that the rule contended for by the defendant's counsel is too narrow. If there were a declaration on the face of a decree that by a limitation in a will of Blackacre to J. S. and his heirs for ever, J. S. took only an estate for life, or that the second son of a man who died intestate seised of freehold land was entitled to the land as heir-at-law and not the eldest son, I rather think that this would be error apparent on the decree, for which, after enrolment, there might be a bill of review, although the practice and all the forms of the Court had been observed in the original suit.

But it will not be necessary for me to lay down any rule upon the subject, for, looking to the alleged error assigned by this bill of review, and assuming that this error is apparent upon the decree, I am ready to say, *in nullo est erratum*.

If it were error, I think it is apparent on the decree. The reformed practice, of not setting out *in extenso* all the proceedings in the suit, was not meant to vary the effect of bills of review. This enrolled decree, after shortly reciting the proceedings, says, "As in and by the said bills, interrogatories, answers, replications, and evidence, duly filed and remaining of record in the said Courts, reference being thereunto had, will more fully appear." "*Verba relata inesse videntur.*"

*The error assigned by the bill of review is that the * 467 agreement for the specific performance of which the original bill was filed was contrary to the Statute 5 Vict. c. 27 (sess. 2), and that the decree which directs the specific performance of this agreement is contrary to this statute. The agreement is set out at length in the original bill, and the decree as enrolled directs the specific performance of it. Therefore, if the decree is erroneous, the error of law is apparent on the face of it.

But after having fully considered the Statute 5 Vict. c. 27 (sess. 2), and compared it with the preceding enabling and disabling statutes respecting ecclesiastical leases, I have come to the conclusion that the agreement is not illegal, and that the lease directed to be made in conformity to it would be valid, and bind-

ing on the successor of the present incumbent of the parish of Fillingham.

I continue of the opinion which I expressed during the argument, that the great question in this case is, whether the lease would have been valid before 5 Vict. c. 27 (sess. 2), passed. If it would not have been valid, *cadit questio*, and the bill for a specific performance ought to have been dismissed. But if it would have been valid, I think that it is not affected by 5 Vict. c. 27, and that the original decree is quite correct.

The conditions prescribed by that statute which are not complied with in this agreement are (as I think) only required in leases by a parson or vicar which, without the additional powers of leasing conferred by this statute, the parson or vicar could not have lawfully granted.

The admission at one time made by the plaintiff's counsel * 468 that before 5 Vict. c. 27 (sess. 2), this agreement * would have been valid, was afterwards retracted. The objection to its validity then relied upon was, that the lessee would be punishable of waste. But I do not think that such an inference is to be drawn from any of the anxious stipulations introduced into the agreement with a view to good husbandry during the term and for the purpose of insuring that the land should be left in good condition at the end of it. It does not appear that Thacker Hill Close was ancient meadow, and *Simmons v. Norton*, (a) so much relied upon, does not show that it is necessarily waste to plough a field that has been in grass, or to lay down in grass a field that has been arable.

By the common law, modified by 18 Eliz. c. 10, a parson or vicar might grant a lease of any part of his glebe for twenty-one years or three lives, the lease being confirmed by the patron and ordinary.

Could it have been the intention of the legislature by 5 Vict. c. 27 (sess. 2), to take away from the parson and vicar the power of leasing for lives altogether and for a longer term than fourteen years, and unless the rent be reserved quarterly and unless all the expensive preliminary forms are observed, and unless all the special covenants are introduced into the lease and all the conditions are performed, which are required to give validity to such a lease as may be granted under the powers conferred by the new enabling statute?

(a) 7 Bing. 640.

There is no intimation in any part of this statute that the legislature intended by it to restrain any power of leasing which parsons or vicars before possessed. The title calls it "An Act for better enabling Incumbents of Ecclesiastical Benefices to demise the Lands belonging to their Benefices on farming Leases," and the preamble *recites that "it would be advantageous to *469 ecclesiastical benefices if the incumbents thereof were empowered, with such consent and under such restrictions as are hereinafter expressed, to demise the lands of or belonging to the see for a term of years certain for farming purposes." Then sections 3, 4, 5, 13, 14, and others, expressly confine the requisites of the lease therein specified to leases granted by incumbents "under the authority of this Act," or "under this Act," or "under the provisions of this Act," clearly indicating that leases were still to be granted by incumbents to which this Act does not apply, and which therefore would be governed as before by the common law and 13 Eliz. c. 10.

There may certainly be an implied, as well as an express, repeal of existing laws by new laws; but that is where the new and the old laws are conflicting and cannot stand together. "*Leges posteriores leges priores contrarias abrogant.*" But if there is no express repeal and the old and the new laws may both be operative, the old remain in force.

The Master of the Rolls, therefore, having decreed the specific performance of a lawful agreement, the assignment of error in this bill of review entirely fails.

The plaintiff's counsel further contended that, at all events, the decree was wrong, because there is at least a doubt on the construction of the statute and upon the validity of the lease, and that the tenant ought not to be decreed to take a doubtful title. According to the very learned and excellent judgment of Lord Justice TURNER, when Vice-Chancellor, in *Pyrke v. Waddingham*, (a) that is to be considered a doubtful title on which other *Judges entertain a doubt, although the Judge who *470 is to decide the cause has none.¹ But it is wholly unnecessary for me further to consider this point, as I am of opinion that

(a) 10 Hare, 1.

¹ See *Mullings v. Trinder*, L. R. 10 Eq. 449; 13 W. R. 1186; 39 L. J. Ch. 833; *Murrell v. Goodyear*, *ante*, 432; 1 Sugden V. & P. (8th Am. ed.) 385, note (d), 386, note (e).

upon a bill of review the plaintiff is confined to the errors which he has specifically assigned, and here no error in respect of doubtful title is assigned; and I am further of opinion that such an error could not be considered "error at law apparent on the decree," and, therefore, after enrolment, could only be reached by an appeal to the House of Lords. The improper decreeing or refusal of a specific performance, where the title is alleged to be doubtful, is not an error of law, but an improper exercise of the discretion vested in the equity Judge, and therefore is the fit subject of a rehearing or an appeal, — not of a bill of review.

Upon the whole I am of opinion that this bill of review discloses no ground for reversing the decree, and that the demurrer to it ought to be allowed.

THE LORD JUSTICE KNIGHT BRUCE. — My impression is, that upon the original hearing between these parties at the Rolls, the bill then before the Court should have been dismissed. I think so, because of the subject and nature and terms of the agreement which it sought to enforce, — that subject being glebe land belonging to an ecclesiastical rectory, — and the law as to ecclesiastical leases being in the state in which it is. Whether, independently of any question of bad or doubtful title, or defective or doubtful power, the agreement is one of which it was or would have been right to decree specific performance at the landlord's instance against the tenant, I give no opinion. But on the ground of the nature of the title, I am not satisfied that this is not
 * 471 a proper case for a bill of review, or that the * demurrer before us ought not to be overruled. The Lord Chancellor and the Lord Justice TURNER, however, being both of opinion that it ought to be allowed, it will of necessity be so.

THE LORD JUSTICE TURNER. — I agree in opinion with the Lord Chancellor, that this demurrer ought to be allowed. I think that the errors assigned are not such as can properly be made the ground of a bill of review.

It is not easy to say precisely what is to be considered as error apparent on which a bill of review may be founded; but I think that the cases warrant the conclusion that a mere error in judgment does not furnish a sufficient foundation for such a bill. Lord

ELDON has expressly so stated in *Perry v. Phelps*, (a) and Lord COTTENHAM has adopted that statement in *Trulock v. Robey*. (b) He has, indeed, gone further, and spoken of such bills as confined to cases in which the decree is contrary to the forms and practice of the Court; but, with all deference to so high an authority, I venture to doubt whether this latter position is correct; for in Viner's Abridgment, title Chancery, letter Z, there are cases which certainly do not fall within the range of that position. If there appears that in a case in which there was a devise of the whole estate, when by the statute only two-thirds could be devised, a bill of review was allowed, and that it was allowed also in a case in which the Lord Chancellor had decided a point of law contrary to the opinion of all the Judges, and under the same letter *placitum* 4, it is said, "so if the Lord Chancellor errs in his conscience upon a matter of fact proved * before him, there * 472 may be a review upon this matter, because there needs no new examination; but this may be reviewed upon the old depositions, and this is usual." This authority, however, such as it is, goes no further than that a bill of review will lie upon an erroneous decision on an equitable point, founded upon the facts in proof, and that the depositions in the original cause may be looked into upon the hearing of the bill of review. It throws no light upon the subject before us, what is the nature of the error on which such a bill can be brought.

In addition to the cases to which I have referred, we are much indebted to Mr. Monro, for having furnished us with several cases from the registrar's books of demurrers to bills of review, and with notes from the registrar's minute-books of what passed upon the hearing of those demurrers. (c) From these notes it appears that the errors assigned were partly on matters of form, and partly on points which had been decided in the causes, not appearing to have involved any general question of law, and the errors were, without an exception, overruled. It is, of course, impossible now to say with certainty whether the objections on the latter ground were overruled upon the merits, or upon the ground that the Court would not entertain them; but, so far as can be collected from the notes, there is, I think, every reason to suppose that the Court overruled these errors upon this ground, that a bill of review could

(a) 17 Ves. 173.

(b) 2 Phil. 395.

(c) For the cases and notes referred to by his Lordship, see *post*, p. 476.

not be founded upon them ; for in some of the notes the objection appears to have been pointedly taken by the defendants' counsel that the errors ran into the merits of the cause, and went to show that the decree was unjust.

* 473 * These cases, therefore, appear to me to lead to the conclusion that a mere erroneous decision cannot be made the subject of a bill of review, thus confirming Lord ELDON's *dictum* in *Perry v. Phelps*, (a) adopted by Lord COTTENHAM in *Trulock v. Robey*. (b) There is also a case of *O'Brien v. Connor*, (c) before Lord MANNERS, which it may be right to notice. His Lordship there speaks of error apparent as error in point of law, that is, he says, an erroneous result drawn by the Court from the facts apparent upon the record ; and he adds, " error in point of law cannot be shown unless it appears that upon the facts alleged and proved, and as such forming part of the record of the decree, the judgment pronounced was a mistake in point of law ;" but he does not say what degree of mistake in point of law will be sufficient ground for such a bill, and the authorities were not fully gone into in the case before him, which had no other foundation than an objection for want of parties not taken at the original hearing.

Upon the whole, looking at the authorities, the cases in which bills of review have been allowed, and in which they have been disallowed, — the just conclusion appears to me to be that such a bill cannot be maintained unless the decree sought to be reversed be contrary to some statutory enactment or to some principle or rule of law or equity recognized and acknowledged or settled by decision, or be at variance with the form and practice of the Court.

Such bills, it is true, are in some respects analogous to writs of error, which, as I apprehend, led in the first instance to the

* 474 introduction of them ; but bearing in * mind that decrees in equity are open to rehearing, and looking to the cases, I think it would be going too far to carry the analogy throughout, and to hold that a bill of review will lie in all cases similar to those in which a writ of error could be brought at law. The signature and enrolment of decrees is a wise provision for terminating litigation so far as this Court is concerned, and it is, I think, of great general importance that the litigation when so terminated should not be reopened except upon the most plain and manifest error. If it is to be reopened upon mere errors in judgment, I can see no end

(a) 17 Ves. 173.

(b) 2 Phil. 395.

(c) 2 Bal. & B. 146.

of litigation here, more especially if what Lord REDESDALE states is correct, that where a decree is reversed upon a bill of review, another bill of review may be brought upon the decree of reversal, a point, however, which, upon the cases, does not appear to be settled.

This being my view of the cases in which a bill of review can be filed, it is to be considered whether this bill can be maintained consistently with that view, and I am of opinion that it cannot. The original bill in this case was filed by a rector for the specific performance by the defendant of an agreement to take a lease of the glebe lands belonging to the rectory. The errors alleged by this bill of review — and it is to the errors alleged only we can look — are that a lease of the glebe cannot be granted otherwise than according to the provisions of the Statute 5 Vict. c. 27 (sess. 2) — that the agreement for the lease is at variance with and repugnant to the provisions of the statute, and that a lease therefore cannot be granted according to the agreement, and that the agreement cannot be specifically performed; that the decree in directing specific performance, and a lease to be settled according to the agreement, is contrary to the statute; and that if the plaintiff be compelled to perform the agreement and to accept the lease, such * lease will be repugnant to the statute, and will not be * 475 binding upon the successors of the defendant, the rector.

These alleged errors amount, as it seems to me, to no more than this, that an erroneous construction has been put upon the Statute 5 Vict. c. 27 (sess. 2); that that statute ought to have been held to have repealed the older statutes, under which, before it was passed, leases of glebe lands could be made, or at all events, and giving the most extended construction to the alleged errors, that it is so doubtful whether the older statutes are not repealed by the statute referred to, that a specific performance ought not to have been decreed.

But the Statute 5 Vict. c. 27, is a modern statute. The construction to be put upon it depends upon its language and provisions, is governed by no settled rule or principle of law, and is affected by no decision. Assuming, therefore, the Master of the Rolls to have erred in the construction of the statute; that he ought to have held it to have repealed the older statutes, or at all events to have held that there was so much doubt as to its operation that a specific performance ought not to be decreed, — his

error, as it seems to me, was mere error in judgment or opinion. He contravened no rule or principle of law, and contradicted no decision, and I think, therefore, upon the grounds already stated, his decree cannot be impeached by a bill of review.

This being my opinion upon the point of pleading, which I have gone into at length, as I consider it to be one of much importance, it is unnecessary for me to give any opinion upon the construction of the statute in question, but I think it right to add that I entirely agree in opinion with the Lord Chancellor upon that point; and that, with deference to my learned brother, who, I believe, * 476 entertains a different opinion, I do not think * the operation of the statute so doubtful as that a specific performance ought not to have been decreed.

Upon the question whether a valid lease can be made under the older statutes, I am not so fully satisfied; but this point does not seem to me to be open upon the errors alleged, and if it is I think it would furnish no ground for maintaining this bill of review.

I am of opinion, therefore, that the demurrer must be allowed.

[Extract from Minute Book.]

OADES v. VIGURES.

L. K. February 8, 1702.

JENNINGS, for the defendant Oades. — We have brought a bill of review, and Vignes hath demurred and pleaded, and here is a decree *nisi* *caused* to pay the money *de bonis propriis*, and we do assign it for error and to pay costs also.

Vernon. — They do (resp.), they had assets sufficient to pay us our 50*l.* with interests and costs, and it is so decreed.

Thornhill, of the same side. — They had above 200*l.* assets, and did admit it so.

The answer read, whereby did ask about 2400*l.* in his hands, and paid over to Oades.

Cum. — Allow the plea and demurrer, and dismiss the bill of review.

[Extract from Registrar's Book, B. 1702, fol. 145.]

Inter JACOB. OADES et CHRISTOFER. PRISSICK ad. JOHIS	} Quer.
HUBBACK, defunct.	
ROBT. VIGURES	Deftem.

L. K. February 3, 1702.

THE matter of the plea and demurrer put in by the defendant Vignes to the plaintiffs' bill of review, which seeks to review and reverse a decree made in a cause wherein John Vignes was plaintiff; * and the now plaintiff * 477 and defendants coming this present day to be argued before the Right Honourable the Lord Keeper, in the presence of counsel learned on both sides, the plaintiffs' counsel opened the several errors assigned for reversing the said decree, and the defendant opened the defendant's pleas, wherein is set forth the bill, answer, replication, decree, orders, reports, exceptions, and proceedings in the said cause, and the said defendant pleads the same in bar to the said bill of review and any relief thereby sought, and the said defendant demurs, for that it appears, by the plaintiffs' own showing, that the said decree is duly signed and enrolled in this Court, and for that no error in law doth appear in the body of the said decree, nor no new matter assigned whereby to reverse the said decree: Upon debate of the matter and reading the now plaintiffs' bill in this cause, and hearing what was alleged on both sides, his Lordship doth order that the said plea and demurrer do stand and be allowed, and that the plaintiffs' bill of review be dismissed.

[Extract from Minute-Book.]

ALLANSON v. DOULBEN.

L. K. July 12, 1703.

Crawford, for plaintiff. — This comes to be heard on a demurrer to a bill of review, and the first error assigned is that there is no such bill between the parties as is set forth to be enrolled.

Serjt. Powys. — There is no such cause entitled as is set forth in the decree.

Mr. Cooper.

Mr. Jennings, for defendant. — There was no process served on any other person than *Mr. Allanson*, nor any other person brought to a hearing.

Mr. Vernon, for defendants. — Though there be other defendants, yet none served or answered.

CUR. — Overrule this error.

Crawford. — There is no time mentioned when the decree passed. It is mentioned to be the 5th year of the reign of the Queen, when it was the first.

The decree read.

The docquet read, wherein it is dated in the first year of the Queen.

CUR. — Overrule this error.

* 478 * *Crawford.* — They left out the word “adjudged” in the drawing-up of the decree.

Serjt. Powys. — It is a necessary word, and never drawn up otherwise.

Mr. Jennings, for defendant.

CUR. — Overrule this error.

Crawford. — There is an error in proceedings in discharging an order, whereby our depositions were suppressed.

Vernon. — This order was discharged on hearing both sides.

CUR. — Overrule this error.

Crawford. — The money is decreed, and we are not to have the vouchers up, being the coexecutor, and we ought to have the vouchers to justify the payments of those vouchers.

Serjt. Powys. — If we are to allow of Evans' payments, we ought to have the vouchers to make out those payments which Evans made to discharge ourselves.

Mr. Cooper. — If the payment by Evans be just, yet we ought to have the vouchers to justify us when we shall be questioned again.

Mr. Jennings. — On a cross-bill, we have sworn when the account was made up all the vouchers were delivered up.

Mr. Vernon. — This is no error in the decree, and it is supposed that the vouchers were delivered up.

CUR. — Overrule this error.

Crawford. — They have drawn up the decree that they shall have satisfaction acknowledged on a judgment obtained on a bond, whereas we ought to have the benefit of the judgment against any other creditor.

Serjt. Powys. — This Evans pretended he was 1500*l.* out of purse in defending of suits, and by the articles between Evans and Allanson, Evans is to be

allowed the same out of the first assets, and by the decree the articles are to be made good. But they drawing up the decree that this 1500*l.* shall be made good, and that the bond shall be delivered up.

Mr. Cooper. — The decree is carried on beyond the agreement in delivering up the bond, whereas we have a bond due to us from Sir William Williams which ought to be first satisfied.

* *Mr. Jennings.* — Do admit this coexecutor and this matter was * 479 demanded, and have a formal decree, and there is no error assigned in the body of the decree.

Vernon. — We demand satisfaction of a debt, and there is a decree for an account of assets; and as to Mrs. Allanson's bond there was no debt made out, and by the decree we are to have satisfaction as for assets.

Decree read.

Serjt. Powys. — There is no general account directed, but an account directed as to satisfy [ing] the remainder of a bond of 1500*l.*, whereas we have a bond of 2000*l.*, and the agreement doth take notice of it, and we have a right to retain as well as they to be paid, and by the decree they will charge us, and we have not a (provisor), to retain.

The decretal order read.

The bill read.

CUR. — Overrule this error.

Crawford. — The next is an error in fact; for the coexecutor Evans brought into the account two sums, as if he had discharged them. Those two sums are included in the 1500*l.*

CUR. — Allow the demurrer to the bill of review.

[Extract from Registrar's Book, A. 1702, fol. 303.]

Inter CAR ALLANSON, Ar. Quer.
JOHEM DOULBEN & Ux. Deftes.

LORD CHAN. July 12, 1703.

THE matter upon the demurrer put in by the defendants to the plaintiff's bill of review, coming this present day to be argued before the Right Honourable the Lord Keeper, &c., in the presence of counsel learned on both sides; upon opening thereof, it appeared that the defendants by their said demurrer had set forth

that by the constant and established rules of this Court no bill of review ought to be admitted to alter or vary any decree of this Court enrolled unless there be a manifest error in law appearing on the body of the said decree as it is enrolled, or for some new matter of fact arising and discovered since the pronouncing of the decree, and that only by leave of this Court upon an affidavit of the truth of such new matter, and the said defendants do insist that it doth not appear in the body of the said decree, as the same is signed and enrolled and of record in the Court, that there are or is any error or errors in the body of the said decree

whereby or by means or reason whereof the said decree ought to be
 * 480 * reviewed or reversed, and in regard also that the pretended errors in the said bill of review set forth are not errors in law appearing in the decree, but allegations and suggestions of matters not mentioned or contained therein, and insomuch also as there is not any such new matter alleged, nor any sufficient new matter disclosed in or by the bill whereby to reverse or alter the decree, nor was there (as is necessary in such case) leave granted by this Court for bringing a bill of review as aforesaid, and for divers other defects appearing in the said bill of review the said defendants do insist that the said decree is not erroneous, but well-grounded, and therefore ought not to be reviewed or reversed: Whereupon and upon opening of the several errors assigned in the said bill of review and upon reading the said bill, as also the order made upon the hearing of the said former cause and of the original docket and enrolment of the said decree, and upon long debate of the whole matter, and hearing what was alleged on both sides, his Lordship held the said several errors, assigned by the said bill of review to be insufficient, and the said demurrer to be good and sufficient, and doth order that the said several errors be overruled, and that the said demurrer do stand and be allowed; and it is further ordered that it be referred to Samuel Keek, Esquire, &c., to tax the defendants their costs in respect of the said bill of review, which is to be paid to them out of the fifty pounds deposited by the plaintiff with the registrar, upon bringing his said bill of review, and that the residue of the said fifty pounds be paid back to the plaintiff Ahanson.

[Extract from Registrar's Book, B. 1703, fol. 357.]

WILLIAMSON v. DAVIES.

L. K. May 12, 1704.

THE matter of the demurrer put in by the defendant Davies to the plaintiff's bill of review (which seeks to review and reverse a decree made the 7th day of February, 13 Guliel. *nuper regis*, in a cause wherein the said D. is plaintiff, against the now plaintiff Williamson, as defendant), coming this day to be argued before the R. H. the L. K., &c., in the presence of counsel learned on both sides, and the said demurrer being, for that by the constant rules of this Court no bill of review ought to be admitted to review or reverse any decree of this Court enrolled, unless it be for manifest error appearing in the body of the said

decree, or for some new matter of fact discovered since the decree pronounced, and it doth not appear in the body of the said decree as it is enrolled, that there is or are any error or errors in law appearing in the body of the said decree, whereby the same ought to be reviewed or reversed, and the pretended errors in the bill of review assigned are not errors in law appearing in the said decree, nor is there any such new matter surmised or pretended by the * bill to have * 481 been discovered since the decree pronounced, as to entitle the plaintiff to bring a bill of review: Upon opening and debate of the matter, and hearing what was insisted on by counsel on both sides, his Lordship doth order that the said demurrer be allowed, and that the said bill of review do stand dismissed out of this Court; and as to the sum of 50*l.* which was deposited with the registrar upon bringing the said bill of review according to the rule of Court for that purpose, it is further ordered that 45*l.*, part of the said 50*l.*, be paid back to the said plaintiff in the bill of review, and that the remaining 5*l.* be paid out to the defendant Davies, for his charges occasioned by the said bill of review.

[Extract from Registrar's Book, B. 1703, fol. 369.]

SHERRINGTON v. HARRIS.

L. K. May 12, 1704.

THE matter of the demurrer put in by six defendants to the plaintiff's bill of review, seeking to review a decree made in 1676, coming on this present day to be argued before the R. H. the L. K., and the said demurrer being for that the decree sought to be reviewed and reversed was made, as appears by the bill, above 27 years since (1676), and therefore after this length of time, either by the words or equity of the statute, which takes off writs of error to reverse judgment after 20 years, a bill of review (being in the nature of a writ of error) ought not to be allowed; further, that the pretended errors in the decree are not sufficient errors in law, nor is there any sufficient matter in the bill set forth to have come to the plaintiff's knowledge since the decree for reviewing or reversing thereof; nor are the allegations in the bill sufficient causes or grounds for reviewing or reversing of a decree. Upon debate thereof, and hearing what was alleged on both sides, his Lordship doth order that the said demurrer do stand and be allowed.

[Extract from Minute-Book.]

WILLIAMS v. FULLER.

L. K. May 24, 1704.

Vernon, for defendant, do demur, for that there is no error assigned to reverse the decree.

Serjeant Hooper. — There be several overtures proposed, but there is an infant concerned, which cannot be complied without the direction of the Court, and pray it may be referred to see whether it be for the benefit of the infant.

Paunceforth. — Opens the bill which sets forth the proceedings in the former bill of Fuller and Lord Warwick, and a decree that Williams * should account for the profits of the estate and deliver possession of that never had nor was in our power to perform.

Serjeant Hooper, for Williams. — We are decreed to answer for the profits which did never receive, whereas the account ought to follow the *pernor* of the profits.

Jennings, for Williams. — Powell took a lease from Lord Warwick, and he made a lease to Ward at above 100*l.* a year, and we are decreed to pay and account for profits that never received.

Paunceforth. — We took an assignment from Ward as his *cestui que trust*, and we are decreed to account for what another person received.

Vernon, for defendant. — This Williams set up an assignment in bar of the ejectment.

The decree read.

CUR. — Overrule the error if not appearing in the decree, and therefore allow the demurrer as to this error.

Paunceforth. — The decree is grounded in a bill revivor to which we were no parties, and yet the decree binds our interest, and if we had been a party we might have avoided the lease.

Dobbins. — The decree before any abatement, and there be two decrees separate and the decree in Fuller's cause, and we cannot revive against Williams, who is still alive.

Vernon. — The causes heard before the abatement.

The decree read.

CUR. — Overrule the said error and allow the demurrer.

Third error on the irregular signing.

Paunceforth. — The next error assigned that we shall assign over the lease and have no recompense for it, which was the lease made by Lord Warwick to Powell and assigned to Fuller.

Mr. Cooper. — We are decreed to assign an interest which never had.

Jennings, Dobbins, and Vernon. — This is no error in the body of the decree, for there is no such error as (that we) are purchasers without notice and did not pay a penny for the pepper-corn lease.

Serjeant Hooper, for Williams. — We are decreed to pay to Fuller that which never cost him a penny.

CUR. — Overrule the error and allow the demurrer as to it.

Paunceforth. — A lease made to Powell, and we are decreed to assign * from (Qy.) Powell, whereas we are the original lessee from the Lord * 483 Warwick.

Mr. Cooper. — The lease to Williams from the Earl of Warwick was before the agreement for laying open the passage.

Dobbins, for defendant. — There were two leases, the two lessees do agree for a passage.

Vernon. — In opening errors they are running into the merits of the cause that the decree is unjust.

CUR. — Overrule this error and allow the demurrer as to it.

Paunceforth. — The next error is (as) to costs.

CUR. — Overrule all the errors and allow the demurrer, and let defendants have their costs taxed and paid out of the money deposited, but let the plaintiff have a month's time to perform the decree.

[Extract from Registrar's Book, B. 1703, fol. 350.]

Inter JOHEM WILLIAMS Quer.
EMIL. HENR. COM. WARWICK et JOHEM FULLER Deftes.

L. K. May 24, 1704.

THE matter, upon the demurrer put in by the defendant Fuller to the plaintiff's bill of review, whereby the said plaintiff seeks to review and reverse a decree made in two causes formerly depending in this Court, in one whereof the now defendant the Earl of Warwick and Holland was plaintiff against the now plaintiff and the now defendant Fuller and others defendants, and in the other cause the now defendant Fuller was plaintiff, and the said Earl of Warwick and

Holland, the now plaintiff Williams and others were defendants, coming this present day to be argued before the Right Honorable the Lord Keeper in the presence of counsel learned on both sides, and the said demurrer being for that there is not any error or matter in law appearing in the body of the decree in the bill of review mentioned or sufficiently shown or set forth in the said bill upon or for which the said decree or any of the matters or things thereby settled and decreed ought to be reversed, set aside, impeached, or altered: Upon opening of the several errors assigned by the plaintiff in the said bill of review, and reading of the said former decree, and hearing what was alleged by the counsel on both sides, his Lordship declared that he conceived that there was not sufficient matter in any of the several errors assigned by the plaintiff in his said

* 484 * bill of review whereby to reverse the said decree, and doth therefore order that the said demurrer do stand and be allowed, and that the said former decree do stand confirmed, and the plaintiff's bill of review be dismissed; but the plaintiff Williams is to have a month's time from this day to perform the said decree: And it is further ordered that Mr. Rogers, one of the Masters of this Court, do tax the defendant Fuller his costs in respect of the said bill of review and demurrer, which are to be paid to him out of the 50*l.* deposited by the plaintiff with the registrar upon bringing his said bill of review.

[Extract from Minute-Book.]

GRICE v. GOODWIN.

L. K. January 5, 1706.

How, for defendant. — Do demur, for that the errors assigned not sufficient to reverse the decree.

Brown, for plaintiff. — Our first error is for that the legacy sank and not a subsisting legacy, or if subsisting is, that it ought not to carry interest during the life of Thomas.

Mr. Serjeant Powis, for . — We say this legacy designed in the nature of a provision and portion, to be paid at the age of twenty-one and charged upon land, and the legatee dying before that age this legacy sunk.

Vernon, for defendant. — This not called a portion or an advancement, but it is a general legacy, and their error is that the father was living at the time of the death of John, which don't appear in the body of the decree.

Cowper, for defendant. — Do say nothing appears in the body of the decree which shows Thomas living at the death of John.

CUR. — Allow the demurrer, and to have costs out of the 50*l.*

[Extract from Minute-Book.]

CLIFTON v. JACKSON.

January 5, 1706.

Brockett, for defendant. — Do demur, for that not sufficient errors in the body of the decree to reverse it.

Cowper, for plaintiff. — The question, if upon the conveyance of our * mother, whereby she aliened the estate, contrary to the statute of * 485 Henry 7, which is for the prevention of the disherison of heirs.

Mr. Solicitor-General, for defendant. — Do object the want of parties, for ought to have Mrs. Clifton before the Court, or her representative.

Mr. Serjeant Hooper, for defendant Dobbins.

CUR. — Overrule the objection of want of parties.

Mr. Attorney-General, for plaintiff. — It was put into the power of the wife on purpose to bar the husband, for knew the wife was prevented from alienating by the statute.

Vernon. — Our bill not only charges error in the body of the decree, but likewise charges a collusion and a feigned defence while we were infants in obtaining this decree, so that they ought not in form to have demurred to the whole bill, but only as to error.

Mr. Serjeant Jekyll, for defendant. — We admit the case by our demurrer to be as in the bill, and demur, for that by their own showing they are not entitled to any relief.

Mr. Solicitor-General, for defendant. — We say the wife was a purchaser of this estate for a valuable consideration, by levying the fine and parting with what estate we had before that levied, and this not within the statute of Henry 7. And by this bill they come to have this Court assist them in a pretended forfeiture of an equitable estate, and to establish such forfeiture.

Mr. Serjeant Jekyll, for defendant. — We say this is not a provision from the husband, for we parted with our estate for life, and let in this incumbrance of 1500*l.* in lieu of having the remainder entail, and so are a purchaser.

Mr. Serjeant Hooper, for defendant.

CUR. — Discharged the order for rearguing, the demurrer and former order to stand, and the defendant to have the money deposited.

[Extract from Minute-Book.]

HELE v. WORTHINGTON.

LORD CHANCELLOR. November 24, 1708.

How, for defendants. — We do demur, for that the matter on which the plaintiff in the bill of review would be relieved was in issue in the original * 486 bill which was exhibited in 1691, and we come * to be relieved for a third of 500*l.*, and the release gained from one sister by surprise, and we have relief as to arrears, and our demand was decreed and the account settled and decree signed and enrolled in 1698, and now pretends the plaintiff had a release prior to us.

Serjeant Hooper. — We plead that there is no error assigned sufficient to reverse the decree, and they that assign errors should open them.

Sir W. Whitelocke. — There is one Taylor hath brought this cause, and hath been in possession seven years, and received twice more than will satisfy his demand, and have set forth a release precedent to theirs, and Johanna Worthington was a witness to our release, and they object no money deposited, which is dispensed withal, being a pauper, and that we did not discover our release, whereas we rested that their release would not be allowed against us.

Jennings. — The decree grounded on the evidence of P. M., who was a witness to the deed-poll which extinguisheth our right to our demand, whereas if they had not prevented, she must make them a satisfaction, and the consideration of the release was her dieting with us for several years.

Cullett. — Their release was to extend, only as to the share of 500*l.*, and not to the arrears.

Release of October, 1689, read.

CUR. — Allow the demurrer, but the plaintiff is by the defendant's consent to be discharged out of prison, and do any act to discharge him.

[Extract from Minute-Book.]

HEATHER v. CHAPMAN.

L. K. March 6, 1710.

How, for the defendant. — This comes to be heard on a demurrer to a bill of review.

The original bill was to be relieved against two bonds, and we demur that there is no error assigned sufficient to reverse the decree.

Serjeant Hill, for defendant.

Mr. Attorney-General, for . — Do charge that the plaintiff drawn into two bonds to the daughters, of 1000*l.* apiece, by the father, and other two bonds of 500*l.*, and the bonds were entered into on the trust in the deed for the sale, and we were to have the residue.

Ayliffe. — Do charge the decree not well-grounded, the bonds being * given on an agreement not performed, and the bonds given for one and * 487 the same consideration.

Serjeant Jekyll and *Vernon*, for defendant. — Instead of error in the decree they assign matter set forth in the bill not sufficient to ground.

CUR. — Allow the demurrer with costs, to be taxed, to be deducted from deposit, and residue to plaintiff, tax costs.

[Extract from Minute-Book.]

INGLEBY v. BOWES.

L. K. July 7, 1711.

Cowper, for defendant. Demur to the bill of review, for that there is no error in the decree.

Bridges, for plaintiff. — The first error is for that the assignment to Sir William Bowes, in trust for the Lady Allison, to protect against double taxes, is absolutely decreed to him.

Mr. Serjeant Powys, for plaintiff. — The second error is the 200*l.* bond.

Mr. Attorney-General, for plaintiff. — *Mr. Solicitor-General*.

Mr. Serjeant Jekyll, for defendant. — This assignment was to Sir William Bowes in the ladies' life, and no trust declared.

CUR. — Allow the demurrer, and the Master to tax the defendant's costs, and that to be paid to the defendant out of the 50*l.*, and the rest to be repaid to the plaintiffs, and refer to Pit.

[377]

[Extract from Minute-Book.]

PRICE v. WATKINS.

How, for plaintiff. — This comes on their demurrer to our bill of review, the first error is for that our bill ought not been dismissed as to the common of pasture, and second error is for that are to pay costs.

Mr. Serjeant Hooper, for plaintiff.

Mr. Serjeant Powys, for defendant.

CUR. — Allow the demurrer, and Master tax the costs, to be paid out of the 50*l.* and the rest returned, and refer to Legard, &c.

* [Extract from Minute-Book.]

FANCOCK v. ENSTICK.

How, for defendant. — Our demurrer is general to the bill of review that there is no error.

Cowper, for plaintiff. — Our first error assigned is that no provision made by the decree that the terms shall not be made use of against the infants.

Mr. Serjeant Hooper.

The decree read.

Cowper, for plaintiff.

Mr. Serjeant Powys, for defendant.

Mr. Serjeant Jekyll, for defendant.

CUR. — Allow the demurrer, and the Master to tax the costs, and that to be paid out of the 50*l.*, and the rest to be retained, and refer to Pit.

[Extract from Registrar's Book, B. 1809, fol. 1021.]

Between GEORGE LOCKER PERRY, Clerk, CHARLES HART, and SOPHIA ELIZABETH, his Wife	} Plaintiffs.
WILLIAM PHELIPS, ROBERT BRETTINGHAM, and MARY, his Wife, WILLIAM SHARP, GRANVILLE SHARP, ELIZABETH SMITH, and CHARLOTTE MARY SMITH, an Infant by the said Robert Brettingham, her Guardian, SAMUEL RODBARD, and BETTY SMITH. .	} Defendants.

LORD CHANCELLOR. July 23, 1810.

THIS cause coming on the 20th and 21st days of July, and also on this present day to be heard and debated before the Right Honourable the Lord High Chancellor of Great Britain, in the presence of counsel learned on both sides, and the pleadings in this cause being opened upon debate of the matter and hearing what was alleged by the counsel on both sides, his Lordship doth order that the plaintiffs' bill do stand dismissed out of this Court with costs, to be taxed by Mr. SIMEON, one of the Masters of the Court.

* LOXLEY v. HEATH.

* 489

1860. February 18, 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A father, prior to the marriage of his daughter, in a correspondence with her intended husband, stated that all his property would be equally divided amongst his children at his decease; but in a settlement executed prior to the marriage there was no expression of any such intention: *Held*, that all that was intended to be binding on the father was embodied in the settlement.¹

THIS was an appeal from a decree of the Master of the Rolls dismissing the plaintiff's bill with costs.

The question in the suit and upon the appeal was whether the Rev. Robert Heath, deceased, by a correspondence with the plaintiff, in contemplation of the marriage of the latter with his daughter, had contracted to leave a portion of his property to his daughter, and if so, whether the contract was one of which specific performance could be decreed, having regard to the lapse

¹ See 1 Sugden V. & P. (8th Am. ed.) 326, note (y), 549, note (g); Williams v. Hathaway, 19 Pick. 488.

of time and the events which had taken place since the death of Mr. Heath, and to the fact that a settlement had been executed upon the marriage, which omitted all mention of such an agreement.

The case is reported below in the twenty-seventh volume of Mr. Beavan's Reports, (a) where the facts are fully stated.

Mr. Roundell Palmer, Mr. Selwyn, and Mr. W. D. Lewis argued in support of the appeal.

Mr. Lloyd and Mr. Hobhouse, for the defendants, in support of the decision below.

The following cases were referred to: *De Beil v. Thomson*, (b) S. C., *nom. Hammersley v. De Beil*, (c) * *Johnson v. Johnson*, (d) *Winter v. Winter*, (e) *Mower v. Orr*, (g) *Wisden v. Wisden*, (h) *Barkworth v. Young*, (i) *Eccles v. Cheyne*, (k) *Luders v. Anstey*, (l) *Partyn v. Roberts*, (m) *Moorhouse v. Colvin*, (n) *Bold v. Hutchinson*, (o) *Gregor v. Kemp*, (p) *Logan v. Wienholt*, (q) *Maunsell v. White*, (r) *Kay v. Crook*, (s) *Battley v. Faulkner*, (t) 29 Car. 2, c. 3.

THE LORD CHANCELLOR. — My conclusion is that the judgment of the Master of the Rolls in this case must be affirmed, though not entirely on the ground taken by his Honor. It is not necessary to give any opinion as to the effect in this case of the Statute of Limitations, nor as to the construction of the contract set up by the plaintiff's bill, because there was not, in my opinion, after the deed of settlement was executed, any binding contract upon which this bill can be maintained. I find here what, upon the face of it, is a perfect marriage contract, and which, *prima facie*, might be expected to contain all the stipulations entered into when it

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| (a) Page 523. | (h) 2 Sm. & G. 396. |
| (b) 3 Beav. 469. | (i) 4 Drew. 1. |
| (c) 12 Cl. & Fin. 45. | (k) 2 K. & J. 676. |
| (d) 3 Hare, 157. | (l) 4 Ves. 501. |
| (e) 5 Hare, 306. | (m) 1 Amb. 315, 317. |
| (g) 7 Hare, 473. | (n) 15 Beav. 349. |
| (o) 20 Beav. 250; 5 De G., M. & G. 558. | |
| (p) 3 Swanst. 404 n. | |
| (q) 1 Cl. & Fin. 611; S. C., 7 Bligh N. S. 1. | |
| (r) 1 Jo. & Lat. 539. | (t) 3 B. & Ald. 288. |
| (s) 3 Sm. & G. 409, 417. | |

was signed. This settlement purports to be made between Mr. Loxley of the first part, Miss Emily Heath of the second part, Mr. Heath of the third part, and the trustees of the fourth part. It recites the intended marriage, and the payment, pursuant to the agreement by Mr. Heath to Mr. Loxley, of * 500*l.* as * 491 a marriage portion with his daughter. I think this was all that was intended as the marriage portion, for I find no hint in the settlement that the lady was to have any further marriage portion to which, in point of law, her husband was to be entitled. The portion was paid, and the payment thereof is acknowledged; and in consideration thereof the husband agrees to assign to the trustees a policy of assurance. The indenture then contains an assignment by the husband of the policy upon the trusts of the settlement, and then follow the covenants.

This I repeat is, upon the face of it, a perfect marriage contract, and, *prima facie*, may be expected to contain all that was intended to be binding upon the parties; and upon the faith of this settlement the marriage took place after the deed had been executed.

Still, if there were clear and convincing evidence that either by fraud or mistake, or without fraud or mistake, that by a clear agreement this was only the execution of part of the marriage contract, and that there was intended to be a subsequent settlement, I do not say this might not have been executed; but on the face of the instrument there is nothing showing it to have been a partial execution of the contract, or that any thing more was to be done. It was final for any thing that appears within the four corners of the instrument. What evidence is there of mistake? — None. What evidence to show this was only a partial performance? — None. It would be most dangerous if, after such a deed has been executed, and after the deaths of some of the parties, and without any clear evidence of fraud or mistake, or of some agreement that this was to be only part of the marriage contract, we were to decide that this was only a partial contract, and that some correspondence * which took place between the parties could * 492 have been intended to be relied on as settling the final contract. I can find no certain evidence for this; I think it dangerous to give credence to any such evidence. Mr. Loxley may have had his just expectations disappointed; but if so, he has himself only to blame for the manner in which the transaction has been conducted.

If there had been no deed, and the marriage had taken place on the faith of the correspondence, a Court of Equity might possibly have held, that the marriage having taken place and proceeded on the correspondence, the parties were bound by it; though it is difficult to say from the letters, whether and at what time they constituted a contract binding upon Mr. Heath, but the existence of a deed like that in the present case renders it unnecessary to decide the point.

The authority which has been chiefly relied on for the plaintiff is *De Beil v. Thomson*; (a) but there are essential differences between that case and this. There the settlement was post-nuptial, but before the marriage there was a clear and distinct contract to settle a second sum of 10,000*l.* There could be no doubt that such was the intention of the contract, and that the marriage took place on that condition. The children after the marriage having become interested under it, the contract could not be altered to their prejudice after the marriage. But here the deed was executed before the marriage. Another material consideration in

Hammersley v. De Beil (b) was that the Baron de Beil * 493 objected to the post-nuptial settlement * because it did not provide for payment of the second sum of 10,000*l.*, and the representation then made to him on that subject turned out to be untrue. Here, however, nothing has been brought forward to impeach the good faith to be ascribed to the parties.

Under these circumstances, the settlement as it stands appears to me to be the only binding contract, and the decree of the Master of the Rolls must be affirmed.

THE LORD JUSTICE KNIGHT BRUCE. — It may possibly be that, if the deed of settlement dated 2d June, 1845, which was executed previously to the marriage of the plaintiff with his deceased wife, the daughter of Mr. Robert Heath, had not existed, or the 500*l.* mentioned in it as paid by him to the plaintiff had not been paid, the plaintiff would have had a claim on Mr. Heath's estate. That sum is on both sides stated to have been in fact paid by him to the plaintiff either before the marriage or within a reasonable time afterwards. The deed of settlement raises a presumption that it constituted or expressed the whole of the marriage contract so far

(a) 3 Beav. 469; S. C., *nom.* *Hammersley v. De Beil*, 12 Cl. & Fin. 45.

(b) 12 Cl. & Fin. 45.

as property was concerned ; a presumption capable certainly of being rebutted or displaced by evidence sufficient for the purpose : but the correspondence and other evidence before us appear to me insufficient to show that beyond or besides what the deed of settlement comprises or mentions there subsisted at the time of the marriage, so far as property was concerned, any contract in contemplation or consideration of the marriage or having reference to it. I think, therefore, that it would have been wrong not to dismiss the bill. The bill has been dismissed, and ought in my opinion so to remain.

* THE LORD JUSTICE TURNER. — The true result of the * 494 evidence in this cause appears to me to be that the whole subject-matter of the contract and treaty was the sum to be settled and advanced by Mr. Heath on the marriage, and that the rest, as to the provision to be made by the father on his daughter after his death, was the subject of representation. What effect should be given to that representation must depend on the words in which it was made. I am satisfied on the result of this correspondence that Mr. Heath never did understand, nor do I think the correspondence was calculated to lead Mr. Loxley to understand, that Mr. Heath would be bound by the representations contained in the letters, to leave to his daughter one-third of his property ; but I think the true inference from the whole correspondence is, that the sole and entire subject-matter of the treaty and agreement, so far as property was concerned, was the settlement of 500*l.* on the marriage by Mr. Heath.

LAMBARDE *v.* TURTON.

1860. January 12, 13. February 29. Before the LORDS JUSTICES.

Estate T. stood limited to E. T. for life, remainder to his first and other sons successively in tail. He had two sons, E. H. T. and R. C. T., and a daughter, Mrs. L. A testator who knew these circumstances devised the L. estate to M. A. T. for life, remainder to E. T. for life ; remainder to R. C. T. for life, remainder to trustees to preserve remainders to his first and other sons

successively in tail; remainder to E. H. T. for life; remainder to trustees to preserve contingent remainders in the usual form; remainder to his second, third, and other sons successively in tail male; remainder to Mrs. L. for life, with divers remainders over. The will contained a proviso that if any person thereby made tenant for life or in tail should become seised of the T. estate, the limitations made by the will in his, her, or their favour should determine as if he, she, or they were dead, and the estate should go over to the person next entitled in remainder. R. C. T. died unmarried almost immediately after the testator. Afterwards E. T. died, and E. H. T. thereupon came into possession of the T. estate. M. A. T. next died, and at her death E. H. T. had only one son, but afterwards had a second son, R. B. T. M. A. T. was the heiress-at-law of the testator, and left a will giving all her property real and personal to Mrs. L.

Held, that although, having regard to the way in which the T. estate was settled, the shifting clause if it applied to E. H. T. made it impossible for him in any event to retain any interest in the L. estate, except by means of an alienation of the T. estate in his father's lifetime; this, though aided to some extent by expressions in other parts of the will, was not a sufficient reason for holding the shifting clause not to apply to him.

Held also, that on the determination of the life-estate of E. H. T. under the shifting clause, the estate did not go over to the next person beneficially entitled, but to the trustees to preserve.

Held, that the trust in favour of E. H. T. was determined as well as his legal life-estate, and that the trustees held the rents accrued after the birth of R. B. T. in trust for R. B. T.

Held, that the rents accrued between the determination of E. H. T.'s interest and the birth of R. B. T. were held in trust for Mrs. L.

Per the Lord Justice TURNER. — The beneficial interest in the estate of the trustees to preserve followed the limitations of the will, and upon the determination of E. H. T.'s beneficial interest there was no resulting trust for the heiress; and Mrs. L. was entitled to the last-mentioned rents directly, and not through the heiress.

THE questions in these causes related to a shifting clause contained in the will of Robert Bell Livesey, and arose under the following circumstances: —

Mary Turton, by her will dated the 16th of April, 1807, devised certain estates, which, for the purpose of distinction, will be called "the Turton estates," to trustees, in trust for Edmund Peters and his assigns for his life, without impeachment of
 * 496 waste; and from and after the *determination of that estate, in trust to preserve the contingent remainders thereinafter limited from being defeated or destroyed; and from and after the decease of Edmund Peters, in trust for the first and all

and every other son and sons of Edmund Peters successively in tail male.

Edmund Peters, the devisee for life named in this will, assumed the name of Turton, and he married Marianne Livesey, the only child of Robert Bell Livesey and Jane his wife. There were issue of this marriage three children, Edmund Henry Turton the eldest son, the plaintiff in the first suit and one of the defendants in the second suit, Robert Consett Turton the only other son, and a daughter, Marianne Teresa, who married Mullon Lambarde, and was one of the defendants in the first suit and the plaintiff in the second suit. All these children were born before the time when Robert Bell Livesey made his will, and were then living, and it was admitted on all sides that Robert Bell Livesey, when he made his will, was aware of the state of the family of his daughter Marianne Turton, and of the dispositions contained in the will of Mary Turton.

By his will, dated the 19th of November, 1830, Robert Bell Livesey devised his estates, which for distinction will be called "the Livesey estates," as follows: He devised them firstly to trustees for the term of 1000 years, upon the trusts after mentioned, and subject to the term, to the use of his wife Jane Livesey for life; then to the use of his daughter, Marianne Turton, for her life, for her separate use; then to the use of Edmund Turton, his son-in-law, for life; and after the decease of the survivor of Edmund and Marianne Turton, to the use of Robert Consett Turton, the second son of Edmund and Marianne Turton, and his assigns, for and during the * term of his natural * 497 life, without impeachment of waste, and from and immediately after the determination of that estate by forfeiture or otherwise, in his lifetime, to the use of the Rev. James Sergeantson and the Rev. Edward Sergeantson and their heirs during the natural life of R. C. Turton, upon the usual trusts to preserve contingent remainders, with remainder to the first and other sons of Robert Consett Turton successively in tail male; and in default of such issue, to the use of the third, fourth, and all and every other the younger son and sons of Edmund and Marianne Turton in tail male; and in default of such issue, to the use of Edmund Henry Turton, eldest son of the said Edmund and Marianne Turton, and his assigns for his life; and immediately after the determination of that estate by forfeiture or otherwise in his lifetime,

to the use of the Rev. James Sergeantson and the Rev. Edward Sergeantson and their heirs, for and during the natural life of the said Edmund Henry Turton, upon trust to preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion might require, but nevertheless to permit Edmund Henry Turton and his assigns, during his life, to receive and take the rents, issues, and profits of the same hereditaments for his and their own use and benefit; and from and immediately after the decease of Edmund Henry Turton, to the use of the second son of Edmund Henry Turton, and the heirs male of his body; then to the use of the third, fourth, and every other younger son and sons of Edmund Henry Turton successively in tail male; with remainder to the use of the second, third, and all the other son and sons of Marianne Turton by any future husband; and in default of male issue of Marianne Turton by such future husband, to the use of Marianne Teresa Turton, eldest daughter of Edmund and

Marianne Turton and her assigns for her life, with divers
 * 498 remainders * over with remainder in default of all the male and female issue of the testators' grandchildren, to the use of his nephew John Bell for life, with remainder to trustees to preserve contingent remainders as before; with remainder to the use of the second, third, fourth, and all and every other the younger son and sons of John Bell successively in tail male, with divers other remainders over.

There was contained in the will this proviso: "Provided always, and I do hereby declare, that in case my said grandson Robert Consett Turton, or the heirs of his body, or any other of the persons hereby made tenants for life or in tail, shall become seised of the settled family estates of the said Edmund Turton, then and from thenceforth the limitation hereby made in his, her, or their favour shall, from the time of his, her, or their becoming so seised, cease, determine, and be absolutely void, as if he, she, or they were dead; and the said hereby devised manor, advowson, messuages, lands, tenements, and real estates, with the appurtenances, shall go over to the person next entitled in remainder under or by virtue of this my will, it being my express wish and intention that both the estates shall not vest in the same person, except as is otherwise hereinbefore provided for." There was a similar shifting clause to take effect upon the accession of certain settled

estates of the Bell family. Then there followed powers of jointuring and of portioning younger children to tenants for life when in actual possession, with this proviso: "Provided always, and I do hereby further declare, that the said settled hereditaments and premises shall not, by virtue of the aforesaid powers of charging with portions, or either of them, at any one time, be liable to the payment of more than the principal sum of 5000*l.* for portions, and that the said powers of jointuring and of * grant- * 499 ing portions shall not be exercised by any tenant for life or in tail who shall be in possession of, or next entitled in remainder to, the settled estates of the said Edmund Turton."

The will contained also the following provisions, upon which some stress was laid by the Lord Justice TURNER. The trusts declared of the term of 1000 years were to raise money for the payment of the testator's debts: "And, further, that my said trustees, or the trustees or trustee for the time being of the said term, shall, at their or his discretion, enter into the actual possession of all and every the said manor, messuages, farms, lands, tenements, hereditaments, and premises comprised in the said term during the life of my daughter the said Marianne Turton, or of the said Edmund Turton, and also during the minority of any of the tenants for life or in tail of the said premises, and receive the rents, issues, and profits thereof; and shall be authorized to let or demise the same hereditaments, or any part or parts thereof, for any term of years not exceeding seven years, at the most approved rents; and shall appoint such agent or agents at such salaries, and adopt such other acts as they may think necessary for the management of the said hereditaments; and shall during the life of my said daughter pay the clear rents and profits into her own hands, for her own separate use and benefit during her life, in manner hereinbefore directed; and also, in case the said Edmund Turton shall survive her, pay the same clear rents and profits unto him during his life, subject, nevertheless, during the life of the said Marianne Turton and of the said Edmund Turton, to the eventual deduction next after mentioned; that is to say, provided always, and I hereby invest my said trustees, or the trustees or trustee for the time being of the said term, with full power, during the lives of the said Marianne Turton * and Edmund Turton, or the survivor of * 500 them, to retain out of the said rents and profits annually such sum or sums of money as may be requisite for the support,

maintenance, and education of the said second son of the said Edmund and Marianne Turton, or such other of their sons and daughters who, under the limitations of this my will, shall be next entitled in remainder to the said hereby settled hereditaments, and to pay and apply the same accordingly until such son or daughter attain the age of twenty-one years; and also out of the same rents and profits to make the said son or daughter such allowance during the lifetime of his or her father and mother, for his or her maintenance and support, as they, my said trustees, or the trustees or trustee for the time being, shall see expedient and as shall be suitable to his or her rank in life." There followed a power to the trustees to cut timber, and after it this power: "And also that it shall be lawful for my said trustees, or the trustees or trustee for the time being of the said term, during the minority of any tenant for life or in tail of the said settled hereditaments, to receive and take the rents and profits of the said hereditaments, and apply a competent part thereof for the maintenance and education of such tenant for life or in tail, until he or she attain the age of twenty-one years, and invest the residue in the names of such trustees or trustee on government or real security, so that the same may accumulate in the nature of compound interest, so far as the rules of law or equity will permit." Trusts were then declared of the accumulated fund.

By a codicil to this will, the testator substituted for the life-estate of Edmund Turton an annuity of 600*l.* a year, and directed that the trustees for the time being of the term of 1000 years should enter into possession "upon trust, after providing * 501 for the annuity and interest * of any other incumbrances, to retain and pay such sum or sums of money for the support, education, and maintenance of the person next in remainder as is provided in my said will, in case the said Edmund Turton had become entitled as one of the tenants for life of the same manor and hereditaments comprised in the said term; and also to retain and pay such sum or sums of money as shall be requisite from time to time for the support, maintenance, and education of all or any of the children of the said Edmund Turton by my said daughter now or hereafter to be born during the life of the said Edmund Turton, other than the one next entitled in remainder as aforesaid." And the surplus was to be invested for the benefit of the younger children.

On the 15th of November, 1831, the testator died at which time

the state of the Turton family mentioned above remained unaltered, but two days after his death, on the 17th of November, 1831, Robert Consett Turton, the second son of Edmund Turton, died an infant and unmarried. Jane Livesey, the widow of the testator, died on the 17th of October, 1846. In the month of March, 1857, Edmund Turton, his son-in-law, the devisee for life under the will of Mary Turton, and also a devisee for life under the testator's will, died. Upon his death the plaintiff Edmund Henry Turton came into possession of the Turton estates, and remained in possession. In the month of May, 1858, Marianne Turton, the testator's daughter, and the only remaining tenant for life under his will whose estate was prior to the estate of the plaintiff Edmund Henry Turton, also died, and upon her death the plaintiff Edmund Henry Turton, according to the order of the limitations in the testator's will, became entitled as tenant for life in possession to the Livesey estates.

* Marianne Turton, by her will dated the 9th of May, * 502 1858, devised and bequeathed all her real and personal estate to her daughter Marianne Teresa Lambarde, the plaintiff in the second suit.

The bill in the first cause was filed by Edmund Henry Turton, to establish his right to the rents of the Livesey estates during his life, notwithstanding the shifting clause. The second suit was instituted by Mrs. Lambarde, who claimed to be entitled to them under the will of Marianne Turton, the heiress-at-law of the testator, on the ground that by the effect of the shifting clause the rents were left undisposed during the remainder of the life of Edmund Henry Turton. At the time of the institution of these suits, Edmund Henry Turton had only one son, who, as it was admitted on all hands, had no interest in the matters in dispute; but, pending the proceedings, he had a second son born, Robert Bell Turton, who was made a party by supplemental proceedings. The effect of the shifting clause was considered by Vice-Chancellor KINDERSLEY in *Lambarde v. Peach*, (a) and his decision was not appealed from. The present suits, by consent of their Lordships, came before this Court in the first instance.

Sir H. M. Cairns and *Mr. Hobhouse*, for Edmund Henry Turton, the plaintiff in the first suit. — We contend that the interest of E.

(a) 4 Drew. 553.

H. Turton in the Livesey estates was not lost by his succeeding to the Turton estates. It is admitted that the testator knew the limitations of the Turton estates, he therefore knew that upon the

death of Edmund Turton, E. H. Turton would become tenant in tail in possession of those estates. * 503

* The testator knowing this, limits the Livesey estates to Edmund Turton for life, and then, after some intervening limitations, to E. H. Turton for life. He must have intended to give something to E. H. Turton, to give him a life-estate in some event at least, but if the shifting clause be construed to extend to him, he could not in any event take. Why was he mentioned in the will at all if he was not to take any thing? Why was his eldest son excluded, and why was he himself named out of his order in seniority? The words of exception in the shifting clause, furnish a strong argument in E. H. Turton's favour, "except as otherwise hereinbefore provided for." There is no express provision to which this exception can apply, it must therefore be intended to meet the case of persons in the situation of E. H. Turton, to whom the shifting clause cannot without absurdity be applied. Then the power to jointure is to be exercised by persons in possession of the Livesey estates, but not if they are in possession of, or next entitled in remainder to, the Turton estates. This shows that the testator intended that there should be exceptional cases, in which the two estates might go together. If the estate of E. H. Turton ceases, the trustees take, and they hold the rents for him. But the shifting clause, as regards him is repugnant and void, for a testator cannot give a man an estate, and at the same time take it wholly away. The Courts have gone great lengths to avoid inconsistency of disposition. *Johnston v. Antrobus*, (a) *Gee v. Corporation of Manchester*, (b) *Spong v. Spong*, (c) *Conron v. Conron*. (d) If the question whether the shifting clause takes effect is doubtful, it must be decided in our favour, limitations of this kind * 504 * being construed strictly. *Thornhill v. Hall*. (e) [*Doe v. Hicks* (g) was also referred to.]

The Attorney-General, Mr. Glasse and Mr. Welford, for Mrs. Lambarde. — Our case is, that on the death of Mrs. Turton, the

(a) 21 Beav. 556.

(b) 17 Q. B. 737.

(c) 3 Bligh N. S. 84.

(d) 7 H. L. Cas. 168.

(e) 8 Bligh N. S. 88.

(g) 7 T. R. 433.

shifting clause took effect, and carried the estate to the person next beneficially entitled in remainder; but if it went to the trustees, then it went to them shorn of the trust for the benefit of E. H. Turton, and the rents go to the heir as undisposed of, and through the heir to Mrs. Lambarde. The arguments on the part of E. H. Turton are insufficient to show that the shifting clause does not apply to him. Edmund Turton and E. H. Turton might have concurred in resettling the Turton estates, so as to prevent E. H. Turton's ever taking them. This probably was present to the testator's mind, he contemplated the possibility of E. H. Turton's giving up those estates in order to keep the Livesey estates. The only question therefore is, whether E. H. Turton is within the terms of the shifting clause, the above consideration wholly removing the alleged repugnancy in the shifting clause. Moreover, if E. H. Turton's view of the shifting clause is right, there is no person to whom the clause, so far as it relates to tenants for life, can apply. The exception in the jointuring power cannot control the express words of the shifting clause. The words of exception at the close of the shifting clause are a qualification to the words declaring the intention of the testator, not to the operative words of the shifting clause. The estate, therefore, was taken out of E. H. Turton. Whether it passed to Mrs. * Lambarde, or * 505 to the trustee to preserve, is a question of greater difficulty. The Vice-Chancellor, in *Lambarde v. Peach*, considered the point concluded by *Doe v. Heneuye* (a) and *Stanley v. Stanley*. (b) There being no appeal from his decision, we cannot contend that it went to Mrs. Lambarde, but we say that in the hands of the trustees, it was subject to a resulting trust for the heir-at-law. The shifting clause deprives E. H. Turton of all benefit; he, therefore cannot have the rents, the trust of them for him being part of the limitation in his favour: Mr. Fearn's (c) opinion, *Stanley v. Stanley*, (d) and they must go to the heir. The second son cannot be entitled in possession while the estate of the trustee subsists. *Morrice v. Langham*. (e)

Mr. R. Palmer and *Mr. Surrage*, for Robert Bell Turton —
We contend that, Edmund Henry Turton having lost the estate

(a) 4 T. R. 13.

(d) 16 Ves. 508, 511.

(b) 16 Ves. 491.

(e) 11 Sim. 260.

(c) Fearn, Cont. Rem., App. vi. 617.

under the shifting clause, Richard Bell Turton upon his birth became entitled, and the rents from that time belong to him. Neither his estate nor that of the trustees to preserve is affected by the shifting clause. Upon the forfeiture of Edmund Henry Turton the estate of the trustees came into possession, and the estate of Edmund Henry Turton being struck out, the trust in his favour is gone. On what trust the trustees then hold must be decided by the intention to be collected from the instrument. There is no case deciding that the trustees will hold in trust for the heir after the birth of a tenant in tail. *Stanley v. Stanley* (a)

shows that the resulting trust ceases when a remainder-man comes into *esse*. *Morrice v. Langham* (b) supports the same view, and so does the opinion of Mr. Fearn in *Doe v. Heneage*. (c) This is consistent with the doctrine of the Court as to resulting trusts, they never result against an intention appearing on the face of the instrument; the doctrine laid down in *Sidney v. Shelley* (d) as to attendant terms supports our argument. The trustees to preserve contingent remainders are appointed for the benefit of the remainder-men, and it is against the apparent intention of the instrument that they should hold in trust for the heir when there is a remainder-man *in esse*.

The Attorney-General, in reply in *Lambarde v. Turton*. — The rents must belong to Mrs. Lambarde during the whole life of Edmund Henry Turton, not merely till the birth of the second son. The argument on the other side, if carried to its legitimate consequences, must go to the extent that the estate of the trustees has ceased, and that of Robert Bell Turton come into possession. Where a gap is found it cannot be filled up with the name of a grantee, unless there is a necessary implication to that effect from the terms of the instrument, but there is a resulting trust for the heir-at-law. The true view is, that during the continuance of the estate of the trustees there is an intestacy as to the equitable interest. The trustee cannot be fixed with any trust beyond the trust expressly declared and a resulting trust for the settlor and his heirs.

Sir H. M. Cairns, in reply in *Turton v. Lambarde*. — It is

(a) 16 Ves. 491.

(c) Fearn, Cont. Rem., App. vi. 617.

(b) 11 Sim. 260.

(d) 19 Ves. 352.

urged against us that the testator may have contemplated
 * a resettlement of the Turton estates taking away Edmund * 507
 Henry Turton's interest; but the testator cannot have entertained such an intention as the other side attribute to him, for he has omitted Edmund Henry Turton's eldest son, which could only be because he foresaw that he was the person who would naturally take the Turton estates. Our argument therefore, that our opponents attribute to the testator the making a gift to a person whom he declares unable to hold it, is not answered. It is urged, that if our contention is right there is no tenant for life to whom the shifting clause could apply. Mrs. Lambarde was a tenant for life and is one of the heirs of Mary Turton, so it might apply to her, and moreover, tenants in tail, born in the testator's life after the making of his will, have their estates reduced to life-estates, so there might have been a class to which it would apply. It is urged that the exception in the shifting clause is not appended to the clause, but to the declaration of the testator's intention. That makes no difference, we rely on the exception as showing the intention. On the wording of this particular will, it cannot be said that any thing is made to cease, except what is given over, there is no gift over of the beneficial interest during the life of Edmund Henry Turton, and therefore that beneficial interest cannot be held to cease. The trustees, if they have taken the estate at all, are trustees for him.

Judgment reserved.

February 29.

THE LORD JUSTICE KNIGHT BRUCE. — These causes relate to the testamentary dispositions made by a gentleman named Robert Bell Livesey, who died in the year 1831, concerning his real property, the Kildale estate, in Yorkshire, those namely contained in his will, for his codicil, which of course I have read as
 * well as the will, does not seem to contain any thing mate- * 508
 rial on the present occasion. And what we have to decide is in whom by virtue of the will according to its true construction, or if he died partially intestate by reason of his partial intestacy, or by both means, has from the death of his daughter Mrs. Marianne Turton been and now is the title to the beneficial receipt or enjoyment of the rents of that estate. To which decision it must probably be

right to add a declaration of our opinion in whom for the future, during the joint lives of two great-grandsons of the testator now living, the beneficial title to the rents of the same property is or will be vested by the means that have been mentioned. Of those two great-grandsons the elder is not before the Court, but the younger, namely, Robert Bell Turton, an infant, is a party before us.

This will has been considered by the Vice-Chancellor KINDERSLEY in another cause, his elaborate judgment in which, dismissing the bill (a dismissal not appealed from), is reported in Mr. Drewry's 4th volume. The argument here on each side has proceeded on the basis and admission that by the expression "settled family estates of the said Edmund Turton," used in the will of the testator, he meant, and with sufficient accuracy described, certain real estates devised by the will, dated in 1807, of a lady named Turton,—Mrs. Mary Turton,—who died some years before the making of Mr. Livesey's will. Mr. Edmund Henry Turton, one of the parties before us, named in Mr. Livesey's will, is the eldest, the first, son of a gentleman named Edmund Turton, whose original surname had been Peters, and who was the first tenant for life under Mrs. Mary Turton's will of those real estates. That gentleman, who is also named in Mr. Livesey's will, was the husband of the testator's only daughter Marianne, Mrs. Marianne Turton already * mentioned, who was a devisee likewise in that will. Of her marriage with Mr. Turton there were three children: namely, Mr. Edmund Henry Turton already mentioned; Robert Consett Turton, a devisee for life named in Mr. Livesey's will; who survived him for a few days, and died in the year 1831, an infant and a bachelor; and Marianne Teresa, now Mrs. Lambarde, one of the parties before us, who is also a devisee named in the testator's will. Mrs. Marianne Turton appears, upon the testator's death, to have become his sole heiress-at-law, and to have married only once. Mrs. Lambarde is stated and, I suppose accurately, to be her universal devisee and universal legatee; but it may be right to notice that in the suit instituted by Mrs. Lambarde, which was heard and dismissed by the Vice-Chancellor KINDERSLEY early in the year 1859 (the case reported as I have said by Mr. Drewry), the title, if any, of that lady under her mother's will, though made after the death of Mr. Edmund Turton, was not brought forward. Mrs. Jane Livesey, mentioned by the testator

in his will, became his widow, and was survived by his daughter Mrs. Marianne Turton, who, in 1858, died the widow of Mr. Edmund Turton; but Mr. Edmund Henry Turton, upon his father's decease, had become tenant in tail in possession, under Mrs. Mary Turton's will, of such of her devised real estates as she had given to Mr. Edmund Turton for his life, and, as I collect, has ever since been and is now in the enjoyment of that property accordingly. Mr. Edmund Henry Turton did not, nor did his sister Mrs. Lambarde, marry in the testator's lifetime; but they both married after his decease. There are two sons (whom I have already mentioned) of Mr. Edmund Henry Turton; of those two sons, the elder, his first son is, as I have said, not before the Court; the second, namely, Robert Bell Turton, who was born not before the year 1859, is, I repeat, before the Court; and the chief

* question that in this state of things we have to decide is, * 510 whether Mr. Edmund Henry Turton is not affected by the first shifting clause in Mr. Livesey's will (the clause, namely, from which I have just now quoted a part of a passage), but is, notwithstanding the clause, entitled now beneficially for his (Mr. Edmund Henry Turton's) life to the real estates devised by that instrument, an instrument in some respects singularly worded (at least as it appears to me), and affording, I think, some plausible grounds of argument to Mr. Edmund Henry Turton upon this point, and his counsel, as I consider, have made the most of them; but the letter of the will appears to me to be against him and too strong to be surmounted, for I think that it does not clearly contradict the spirit. There may be room for doubt whether in this respect the letter and the spirit agree together; but if so, that is not sufficient to displace the letter. The position in which, when Mr. Livesey's will was made, Mr. Edmund Henry Turton stood with respect to the devised estates of Mrs. Mary Turton that have been mentioned, the expression "except as is otherwise hereinbefore provided for," and the language of the powers of jointuring and charging portions, have seemed to me to afford rational foundation for argument against the exclusion of Mr. Edmund Henry Turton, but are, in my judgment, I repeat, not sufficient for the purpose. If Mr. Edmund Henry Turton is excluded, the case is then, I think, free from difficulty.

I consider that under the will of the testator, or that of his heiress-at-law Mrs. Marianne Turton, the rents of Mr. Livesey's

devised estates from her decease until the birth of Robert Bell Turton belong beneficially to Mr. and Mrs. Lambarde, or to one of them; and that from the birth of Robert Bell Turton the rents belong beneficially to him, notwithstanding the adverse * 511 claims * of Mr. and Mrs. Lambarde, which so far I think unfounded.

The testator certainly, in my opinion, has not died intestate as to the beneficial title to these rents from the time of Robert Bell Turton's birth to the death at least of himself or of his elder brother, and has given it to Robert Bell Turton. But in what persons or person the beneficial title to the rents which shall accrue after the death of either of them is or will be I have not meant, nor do I on the present occasion intend, to express or intimate any opinion.

As to the costs of these suits, I think that Mr. and Mrs. Lambarde and Edmund Henry Turton respectively should neither pay nor receive any; and that the costs of the other parties should, as between solicitor and client, be paid out of the rents belonging to Robert Bell Turton.

The Lord Justice TURNER, after stating the facts of the case in nearly the terms of the above statement, proceeded as follows:—

The question is, who is entitled to the rents and profits of the Livesey estates, accrued since the death of Marianne Turton in the month of May, 1858, and henceforth to accrue during the life of the plaintiff Edmund Henry Turton. The plaintiff Edmund Henry Turton claims to be entitled to these rents, on the ground that the limitation in his favour contained in the will has not, as he insists, been determined by the shifting clause; or that if the shifting clause determined it, the estates went over to the trustees for preserving contingent remainders, as the persons next entitled in remainder, and have been and are held by them during * 512 his life in trust for him. Mrs. * Lambarde, claims to be entitled to these rents, on the ground that by the operation of the shifting clause the estates, as she insists, went to her upon the death of Marianne Turton, as the person then next entitled in remainder; or that if the estates went over to the trustees for preserving contingent remainders, they have held and hold the estates during the life of the plaintiff Edmund Henry Turton in

trust for her, either as the person next entitled in remainder under the will, or as the devisee of Marianne Turton, the heiress of the testator, who, if she did not herself become entitled to these rents, she contends became entitled to them by way of resulting trust; and she insists that in any event she is entitled to the rents which accrued before the birth of Robert Bell Turton, the second son of the plaintiff Edmund Henry Turton. The defendant Robert Bell Turton, as such second son, also claims to be entitled to the rents accrued since his birth, and hereafter to accrue during the life of the plaintiff Henry Edmund Turton.

As to the claim of the plaintiff Edmund Henry Turton, it was not attempted to be denied that the shifting clause standing by itself, and without reference to the exception at the close of it, would reach the limitation in favour of the plaintiff Edmund Henry Turton, and would, if valid, be effectual to determine it; but it was said that the context of the will is sufficient to show that this limitation was not intended to be affected by the clause, and to exempt it from being so affected. This will, however, is evidently framed for the express purpose of preventing the Turton and Livesey estates being held by the same person. The order and course of the limitations in the will throughout points to that end, the proviso seems to me to have been intended more completely to effectuate that purpose. Having framed the limitations in the best mode he could for preventing the result * he was * 513 anxious to avoid, the testator adds this proviso, the effect of which, as I understand it, is that *eo instanti* any tenant for life or in tail shall become seised in possession of the Turton estates, his interest in the Livesey estates shall cease, determine, and be void as if he was dead. The testator, I think, could hardly have expressed his purpose more determinately, and a very strong context, therefore, must be required to warrant us in adopting a construction which would lead to a result so different from what the testator plainly desired to effect. There must be a context sufficiently strong to satisfy us that the words "any tenant for life" contained in the proviso were not meant to apply and do not apply to the plaintiff Edmund Henry Turton, who, in the previous part of the will, has been made tenant for life. It was said on the part of the plaintiff Edmund Henry Turton that the mention of his name in the will at all was a mere delusion if his life-interest was intended to be determined by the proviso — that, according

to the will of Mary Turton, he would succeed to the Turton estates upon the death of his father Edmund Turton, and that, according to the testator's will, he could not succeed to the Livesey estates until his father Edmund Turton was dead, so that the proviso, if applied to the limitation in his favour, would necessarily operate to determine that limitation either at or before the time when the limitation would take effect in possession. This point was most ably and strongly pressed upon us, but it has failed to satisfy my mind. Without reference to the alterations which might possibly be made in the limitations of the Turton estates, during the life of Edmund Turton (although I am far from satisfied, that such alterations may not have been in the contemplation of the testator, and that he may not have intended, if the intervening limitations should fail, to leave it in the power of Edmund Turton and

* 514 the plaintiff Edmund Henry Turton to determine * whether the plaintiff Edmund Henry Turton should take the Turton or the Livesey estates ; and if they should determine on his taking the Livesey estates, to effectuate that determination by making a different settlement of the Turton estates) ; independently I say of that consideration, it is to be observed that an estate during the life of Edmund Henry Turton was necessary to be created in order to preserve the contingent remainder in favour of his second son. In the absence of such an estate, there might not have been any estate to support that remainder, in the event of the death of Robert Consett Turton without issue before the birth of the second son of the plaintiff Edmund Henry Turton. The estate might indeed for this purpose have been limited to trustees during the life of the plaintiff Edmund Henry Turton ; but surely if an estate was necessary to be created during his life, it is not to be wondered at, more especially having regard to the circumstances to which I have adverted, that it was according to the usual course given to him, with remainder to trustees during his life, and not merely to trustees during his life. It seems, to me, therefore, that the argument attempted to be drawn from the creation of the life-interest being futile, if it was intended to be defeated by the proviso, cannot be maintained.

Another argument in favour of the plaintiff Edmund Henry Turton was rested on the exception at the end of the proviso, "except as hereinbefore is otherwise provided," but this exception follows upon and applies to the provision that the estates shall

not vest in the same person ; and I think it was meant to express no more than that any tenant for life or in tail might retain the vested interests given to him by the will until he became seised in possession of the Turton estates. The proviso at the end of the jointuring and portion clauses was * also relied * 515 upon on the part of the plaintiff Edmund Henry Turton, but I think it would be very unsafe to conclude that because the words of this proviso extend to tenants for life in possession of the Turton estates, which may have been the result of superabundant caution, the testator did not intend to include such tenants for life under a description which in terms embraces them. It was also suggested on the part of the plaintiff Edmund Henry Turton that the proviso was repugnant and void, but what has been already said seems to me to answer that argument.

Then as to the other ground of claim on the part of the plaintiff Edmund Henry Turton, I agree that the estates went over to the trustees to preserve contingent remainders. They are plainly the persons "next entitled in remainder," and in the absence of any context to explain those words, and I can find no such context in this will, they must have their ordinary meaning. The authorities, too, seem to me to be decisive upon this point ; and to hold that the estates did not go over to the trustees would be to defeat the contingent remainders which it was the purpose of their appointment to preserve. Although the estates thus go over to the trustees to preserve contingent remainders, I think that the trust declared of them for payment of the rents to the plaintiff Edmund Henry Turton during his life cannot take effect, for by the express terms of the proviso his estate ceases as if he was dead. In my opinion, therefore, the claim of the plaintiff Edmund Henry Turton wholly fails.

We come then to the claim of Mrs. Lambarde. So far as her claim rests upon the ground of the estates having gone over to her as the person next entitled in remainder under the will, I have already stated my * opinion to be that the * 516 estates went over to the trustees to preserve contingent remainders. It is unnecessary therefore to say more upon that point. The question to be considered with reference to this claim is, whether the trustees for preserving contingent remainders, who cannot of course hold the rents for their own benefit, are trustees for her of the whole or any part of those rents, either

under the will or by virtue of the title derived to her through the heiress of the testator. This question resolves itself, I think, into two points, first, whether the beneficial interest in the rents results to the heir or follows the limitations of the will; and, second, whether if it follows the limitations of the will it follows them throughout, or only as they stood at the time of the estate of the trustees coming into possession. As to the first of these points, the question whether a beneficial interest results to the heir or follows the limitations of the estate depends, as I apprehend, upon the intention to be collected from the instrument on which the question arises. If an intention to dispose of the beneficial interest is either expressed in the instrument, or to be collected from its provisions, the interest cannot, as I conceive, result to the heir. Here there is certainly no express declaration what is to become of the beneficial interest in the rents in the event which has happened, but is there not an intention to be implied from the will, sufficient to prevent it from resulting to the heir? The estate of the tenant for life is to cease as if he was dead. If he was actually dead, the rents would go to the remainder-man. Must not the testator have intended that they should go to him when the estate ceases, as if he was dead? The authorities seem to me to warrant this conclusion even in the absence of any special indications contained in the instrument. I refer more

particularly to Mr. Fearne's opinion in *Doe v. Heneage*, * 517 and to the case of *Stanley v. Stanley*, but in * this will there are, as it seems to me, special indications of intention, which even in the absence of those authorities might be sufficient to decide the point. In this will powers are given to the trustees of the 1000 years' term to enter on the estates, and during the lives of Edmund and Marianne Turton to apply the rents, amongst other purposes, for the maintenance of their second son; and further, during the minority of any tenant for life or in tail, to apply the rents for his or her maintenance; and the like provision is contained in the codicil. This testator, therefore, has dealt with the rents as applicable for the benefit of a remainder-man even during the lives of Edmund and Marianne Turton, a provision which seems to bring the case very much within the range of *Bullock v. Stones*. (a) Looking to this circumstance, and to the authorities to which I have referred, and to which I may add

(a) 2 Ves. Sen. 521.

the cases of *Sidney v. Shelley*, referred to in the argument, and *Genery v. Fitzgerald*, (a) which do not seem to me to be without their bearing upon the point, my opinion is, that the beneficial interest in these rents does not, in this case, result to the heir, but follows the limitations of the estate. Then does it follow them throughout, or only as they stood at the time when the estate of the trustees came into possession? Upon this point I feel no doubt. The interest in question is the creature of a Court of Equity, and a Court of Equity will of course mould it according to the limitations of the will. In the result, therefore, I have come to the same conclusion as my learned brother. I think Mrs. Lambarde is entitled to the rents which accrued before the birth of Robert Bell Turton, but that Robert Bell Turton is entitled to the rents which have since accrued, and which shall accrue so long as he holds the estate.

* SLIM v. CROUCHER.

* 518

1860. February 25. March 3, 10. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for 98 years and a half, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor being apprised of the requisition and of its object, signed the required intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease which was then mortgaged by the borrower to the lender. It turned out that the lessor had some time before demised the same premises for the same term to the borrower, by whom it had since been assigned for value. *Held*, that the Court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advanced with interest,¹ and that it was a proper case for the exercise of such jurisdiction, although the lessor was not shown to have been guilty of fraud, or of having done more than forgotten the previous lease when he granted the second.²

(a) Jac. 468.

¹ See *Ramshire v. Bolton*, L. R. 8 Eq. 294; *Hill v. Lane*, L. R. 11 Eq. 215; *Leather v. Simpson*, L. R. 11 Eq. 398; *Kerr Inj.* 5, 6, 7, 32.

² See *Brown v. Savage*, 5 Jur. N. S. 1020; S. C., 4 Drew. 635; *Price v. Macaulay*, 2 De G., M. & G. 339, 345; *Hutton v. Rossiter*, 7 De G., M. & G. 9, note (1); *Jennings v. Broughton*, 5 De G., M. & G. 126, note (1); *Barry*

THIS was an appeal from the decree made by Vice-Chancellor STUART, directing the appellant John Thomas Croucher, within one month after service of the decree, to pay to the plaintiff James Slim, the sum of 300*l.* and interest thereon at the rate of 5*l.* per cent per annum from the 2d of May, 1857, to the day of payment, and to pay the plaintiff his costs of suit when taxed.

In December, 1856, a builder named Thomas Hudson, having finished building four houses on a piece of land in Croucher Place, Bromley, in Middlesex, applied to Messrs. Norton & Co., the plaintiff's solicitors, and requested to know if any client of theirs would lend Mr. Hudson money on a mortgage of the houses, informing them at the same time that Mr. John Thomas Croucher, to whom the land belonged on which the houses were built, had agreed to grant Mr. Hudson a lease of it for 98 years and a half, from Christmas, 1853, at a peppercorn rent.

Messrs. Norton & Co. having read the agreement for a lease which was shown to them by Mr. Hudson, required an assurance from Mr. Croucher that he would grant a lease according to the agreement.

* 519 * Under these circumstances Mr. Hudson applied to Mr. Croucher and informed him of the agreement, and Mr. Croucher thereupon wrote and sent by Mr. Hudson the following letter to Mr. Norton : —

“Post-office, Shadwell, December 7, 1856.

“SIR,—I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected, and situate at Bromley, to Mr. Hudson.

“I am, sir, yours, &c., &c.,

“ — Norton, Esq.

J. T. CROUCHER.”

The plaintiff then satisfied himself of the value of the proposed security, and Messrs. Norton & Co. proceeded to prepare a lease in the terms agreed upon.

On the 30th of January, 1857, Messrs. Norton & Co. wrote to J. T. Croucher and to Hudson, informing them that the draft of the lease was prepared, and requesting them to call and examine

v. Croskey, 2 J. & H. 1; *Rawlins v. Wickham*, 3 De G. & J. 313, and note (1); *Kerr F. & M.* (1st Am. ed.) 45–47, 53, 68, 69, 333, 341, 342; *Lewin Trusts* (5th Eng. ed.), 501.

it. Croucher and Hudson accordingly called and examined the draft lease at the office of Messrs. Norton & Co., and signed at the foot thereof a memorandum of approval, as follows:—

“ We have approved and do approve of this draft lease dated the 14th January, 1857.

“ J. T. CROUCHER.

“ THOMAS HUDSON.”

A lease was afterwards engrossed from this draft, and with a counterpart was duly executed by both Croucher and Hudson at the office of Messrs. Norton & Co., who retained the lease on behalf of the plaintiff as a security, and handed over the counterpart to Mr. Croucher.

Between the 19th of January, 1857, and the 2d of May, 1857, the plaintiff advanced to Mr. Hudson * various sums * 520 of money, amounting in the whole to 300*l.*, on the faith of the security; and on the 2d of May, 1857, Mr. Hudson delivered to the plaintiff a deed purporting to be a mortgage by way of underlease of the houses comprised in the said lease to secure 300*l.* and interest.

In August, 1857, Mr. Hudson, having become embarrassed, went abroad, where he had ever since remained.

Shortly afterwards, the plaintiff discovered that in August, 1856, Mr. Croucher had granted to Hudson a lease for ninety-nine years, or some long term of years; which lease included all the premises comprised in the plaintiff's security, and was still subsisting. This lease had been duly registered at the Middlesex Registry Office, and afterwards assigned by Mr. Hudson for value to a stranger, so that at the date of the plaintiff's mortgage Mr. Croucher had no right to grant to Hudson the lease which he had mortgaged to the plaintiff, and, in fact, the latter lease was wholly worthless.

The bill was filed against Croucher and Hudson, and stated to the above effect and that under the circumstances aforesaid the plaintiff had been induced to lend the 300*l.* by fraud, misrepresentation and concealment on the part of both the defendants; and that Croucher, in manner aforesaid, had assisted Hudson in misleading and deceiving the plaintiff, and in obtaining by means of such deception the plaintiff's money; and it prayed that

Croucher might be ordered to repay to plaintiff the 300*l.*, with interest, from the respective times of advancing the sums composing the same, and all costs, charges, and expenses incurred by the plaintiff in consequence of the said fraud, misrepresentation, * 521 and * concealment, the plaintiff offering to deliver up the said lease, and to execute a release as the Court should direct, and that Croucher might pay to the plaintiff his costs of the suit.

The appellant Croucher denied the truth of the allegations of fraud, misrepresentation, and concealment, and stated by way of defence that at the time of granting the lease comprised in the plaintiff's security, he had forgotten the grant by him to Hudson of the prior lease of the same premises, and had, in consequence, inadvertently granted the second lease.

On the 24th of January, 1860, the Vice-Chancellor, on a motion for decree, made the order under appeal.

The case is reported in the 2d volume of Mr. Giffard's reports. (a)

Mr. Malins and *Mr. G. L. Russell*, for the plaintiff. — This case is governed by *Burrowes v. Lock*. (b) Equity will order the defendant Croucher to indemnify the plaintiff for the loss occasioned to him by having taken the security of an invalid lease, relying upon the representation of the defendant that he had the power to grant the lease. *Evans v. Bicknell*, (c) *Rawlins v. Wickham*. (d)

Mr. W. D. Lewis and *Mr. Surrage*, for the appellant, the defendant Croucher. — The defendant Croucher, in the transaction in question, did not stand in any fiduciary relation towards the plaintiff, and the representation complained of was made without * 522 fraud. The only relief, therefore, the plaintiff * could be entitled to in this Court would be a decree for specific performance. But a decree for specific performance is out of the question in the circumstances of the case, and it being impossible to replace the parties in the position in which they stood before the misrepresentation was made, this Court cannot award compensation for the loss sustained by the defendant in consequence of the non-performance of the contract into which he was induced to enter, relying upon the truth of such representation. His remedy is at law only.

(a) Page 37.

(c) 6 Ves. 174.

(b) 10 Ves. 470.

(d) 3 De G. & J. 304.

The rule of the Court is thus stated by Lord COTTENHAM in *Sainsbury v. Jones*: (a) "I certainly recollect the time at which there was a floating idea in the profession, that this Court might award compensation for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing; and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord KENYON, in *Denton v. Stewart*, (b) had not been formerly overruled; but, at that time, very little weight was attached to it, and very few instances occurred in which plaintiffs were advised to ask any such relief; and, for a short time, Sir W. GRANT's decree in *Greenaway v. Adams*, (c) added something to the authority of *Denton v. Stewart*, (b) although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for, *Greenaway v. Adams* (c) occurring in 1806, Lord ELDON in 1810, in *Todd v. Gee*, (d) expressly overruled *Denton v. Stewart*, (b) and from that time there has not, I believe, been any doubt upon the subject." The plaintiff's loss, in the present case, has * been occasioned, in a great measure, by his own negligence, in not searching the register. * 528

They referred to *Puleford v. Richards*, (e) *Clifford v. Brooke*, (g) *Arnot v. Biscoe*, (h) *Partridge v. Usborne*, (i) *Blair v. Bromley*, (k) *Rawlins v. Wickham*, (l) *Edwards v. M'Leary*, (m) *Clare Hall v. Harding*, (n) *Dann v. Spurrier*, (o) *Pearce v. Creswick*. (p)

Mr. Malins was not called on to reply.

THE LORD CHANCELLOR. — The defence set up in this suit is, that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now that there was a remedy at law

(a) 5 Myl. & Cr. 3.

(b) 1 Cox, 258.

(c) 12 Ves. 395.

(d) 17 Ves. 273.

(e) 17 Beav. 87.

(g) 13 Ves. 131.

(h) 1 Ves. Sen. 95.

(i) 5 Russ. 195.

(k) 5 Hare, 542.

(l) 3 De G. & J. 304.

(m) Coop. 308.

(n) 6 Hare, 273.

(o) 7 Ves. 235.

(p) 2 Hare, 286.

I think is quite clear. Here was a misrepresentation made by the defendant of a fact which ought to have been within his knowledge, it was made with the intention of being acted upon, it was acted upon, and thereby a loss accrued to the plaintiff, and there is no doubt in my mind that an action would lie, and that it would be for a jury to assess the damages. I am of opinion, however, that this belongs to a class of cases over which Courts of Law and Courts of Equity have a common jurisdiction, and in which the procedure of both jurisdictions is adapted for doing justice. I do not regret that there is such a class of cases, nor should I be sorry to see it extended. But being of opinion that this is a case

* 524 in which a Court of Equity has jurisdiction * as well as a Court of Law, I think that it is a much fitter case for a Court of Equity than for a Court of Law, because a Court of Law could only have left it to a jury to assess the damages; whereas here, by the superior powers of the Court of Equity, justice can be done between the parties in the most minute detail.

There has been a misrepresentation; and if there had been moral fraud in the case, it could hardly have been disputed that a Court of Equity would have had jurisdiction to inquire into it, and to call upon the defendant to disclose all that he knew, and give relief from the consequences of the fraud. Now, although there may not be moral fraud here, yet I think that the party who has been injured has a right to relief. Mr. Lewis, in a very able argument, has cited a number of cases in which he says that a contrary doctrine has been laid down in this Court, but he has not cited one single case similar to this, where it is held that equity will not give relief.

I think that his authorities may be divided into two classes, one where there was only a general claim to damages, which a Court of Equity at that time could not have properly assessed, and the other class where there was a breach of a promise, not the misrepresentation of a fact. But here there is the misrepresentation of a fact, and there is no difficulty at all in assessing the amount of the loss and in doing justice between the parties. I cannot distinguish this case from the case of *Burrows v. Lock*. (a) There the defendant is called a trustee, because he was a trustee, but the word is used merely to designate the person who took a part in

(a) 10 Ves. 470.

the transaction. There was no fiduciary relation between the plaintiff * and the trustee who made the misrepresentation. • 525 They were strangers to each other just as much as the plaintiff and the defendant are in this case, but the trustee stated, and stated innocently, just as much as the defendant in this case, what was untrue ; and it was held that he was liable to make good the loss that had arisen from his misrepresentation. I believe that every word which Sir WILLIAM GRANT uses in that case is applicable to this. “ It is objected,” he says “ that this is a demand for damages : also that this was not a wilful misrepresentation. As to the first point, the demand is properly made in equity ; and the Lord Chancellor, in *Evans v. Bicknell*, (a) declared that the case of *Pasley v. Freeman*, (b) and all others of that class, were more fit for a Court of Equity than a Court of Law : but his Lordship was clearly of opinion that at least there is a concurrent jurisdiction ; and says, ‘ It has occurred to me that that case, upon the principles of many decisions in this Court, might have been maintained here ; for it is a very old head of equity that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.’ ” That is, you may undo the transaction, and you may replace the person to whom the representation is made as far as possible in the same situation in which he was before the representation was made. Lord ELDON certainly does say, “ If he knows it to be false.” But the meaning of that qualification of the proposition is, as I understand the words, “ if he makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment that he made the representation he had forgotten it.” It so happens that • in the case of *Burrowes v. Lock*, (c) the person who made the representation set up the same defence as is now done by Mr. Croucher. Sir W. GRANT goes on to say ; “ In this case the plaintiff was going to deal with Cartwright upon a matter of interest ; and applied to the person best qualified to give information, the trustee, to know what Cartwright was entitled to ; who told the plaintiff expressly that Cartwright was entitled to 288*l.*, and had an undoubted right to make

(a) 6 Ves. 174.

(b) 3 T. R. 51.

(c) 10 Ves. 470.

an assignment to that extent, knowing that he had not a right to make such an assignment, having previously agreed to give another person 10l. per cent out of the fund. There is therefore a concurrence of all circumstances which the Lord Chancellor thinks requisite to raise the equity. The excuse alleged by the trustee is, that, though he had received information of the fact, he did not at that time recollect it. But what can the plaintiff do to make out a case of this kind, but show, first, that the fact as represented is false, secondly, that the person making the representation had a knowledge of a fact contrary to it."

These are identically the circumstances of the present case, and *Mr. Lewis*, I think, admitted that but for the single circumstance of the defendant in the former case having been a trustee, the cases would be precisely the same. But, as I have already observed, the trustee in *Burrowes v. Lock* (a) was just as much a stranger to the person to whom he made the representation as *Mr. Croucher* was a stranger to the present plaintiff. It seems to me that that case is precisely in point, and I do not find that it has ever been questioned. I think it a sound decision, and that on the authority of it this appeal ought to be dismissed.

* 527 * THE LORD JUSTICE KNIGHT BRUCE.—Of the merits of this case, with an exceedingly slight exception which I shall notice, there of course can be no possibility of question. A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization. The only point reasonably arguable was, in which of the courts in this country redress should be sought, and it has been said that the redress should be sought in a Court of Law. It is true that (according to modern practice—a useful and beneficial practice, I believe) a Court of Law would afford redress in the case by means of an action, with the assistance of a jury, but the Courts of Law in this country exercise jurisdiction in these cases by means of a gradual extension of their powers—an extension which I believe has been useful to society; and we know that that does not deprive the Courts of Equity of their ancient and undoubted jurisdiction which they exercised before Courts of Law had enlarged their limits. The observation is familiar—and some of us have heard it used by Lord ELDON—that the jurisdiction

(a) 10 Ves. 470.

not only belongs to this Court, but belonged to it originally. I do not say that effectual redress, if the case had gone before a jury, would not have been obtained. But there is really, in my judgment, no question, except on two points of little importance: one is, that the rate of interest, given by the decree, is 5*l.* per cent instead of 4*l.*; the other is, that the plaintiff has not been directed to make an assignment of the leaseholds. His counsel, however, have expressed his willingness to undertake to execute such an assignment at the reasonable costs of the defendant Mr. Croucher. The appellant must pay the costs of this appeal, which must be dismissed.

* THE LORD JUSTICE TURNER. — I am also of opinion that * 528 this decree is right, and I think that if we were to grant any relief upon this appeal, we should be very much narrowing an old jurisdiction of this Court, by confining it to cases in which the jurisdiction has been exercised. We should, I think, be taking the cases as the measure of the jurisdiction instead of as the examples of that jurisdiction. Lord ELDON, in *Evans v. Bicknell* (a), puts the case plainly and pointedly thus. He says: "The question then is, supposing the husband's interest insufficient to satisfy the mortgage, whether there is a personal demand against Bicknell, upon the circumstances of his conduct; and whether, if there is, it can be enforced in a Court of Equity;" and he says, "If there is a jurisdiction at law in such cases, there is also a jurisdiction in equity; and then, if there is a concurrent jurisdiction, there can be no reason for dismissing the bill." He speaks of it as an old head of jurisdiction of this Court, not to be displaced by the assumption of the jurisdiction by a Court of Law, but which must remain the jurisdiction of the Courts of Equity until it is taken away by statutory enactment. I think, therefore, that the authorities support the decree. I do not mean to say that in all cases the Court will exercise the jurisdiction. It is in the power of the Court to say that it will not do so in particular cases, but I am perfectly satisfied that this is a case in which the jurisdiction ought to be exercised.

My opinion, therefore, is that the appeal must be dismissed with costs.¹

(a) 6 Ves. 174-182.

¹ See Kerr F. & M. (1st Am. ed.) 350, 390.

1860. March 2. Before the LORDS JUSTICES.

An order having been made on motion before the hearing giving the plaintiff liberty to enter the defendant's ground for the purpose of inspection, and for the same purpose to break up the soil in the manner therein specified. *Held*, on appeal, that the latter part of the order ought to be discharged, it not being according to the course of the Court that such liberty should be given on an interlocutory application before the hearing.

THIS was a motion by the defendants to vary an order of Vice-Chancellor STUART allowing inspection by the plaintiff of lands belonging to the defendants.

The plaintiff was the occupier of mining property called the Priddy Minery. The defendants were the occupiers of adjoining property lying to the northward of it. The bill was filed to restrain the defendants from intercepting the flow of water to the plaintiff's mine. There was an ancient reservoir on the defendant's land, and the defendants had recently repaired the bank on the side adjoining the plaintiff's land to the height of 1 ft. 10 in. above the ground. The plaintiff alleged that the effect of this was to prevent a flow of water from the reservoir towards the plaintiff's land; and various other acts of the defendants were complained of as having the effect of preventing water from coming to the plaintiff's property. The defendants denied that the repair of the embankment had at all affected the flow of water from the reservoir, and further set up the case that the geological conformation of the ground was such that there never could have been a natural flow of water from the property of the defendants to that of the plaintiff. On the 29th of February, 1860, the plaintiff moved for an order that he might be at liberty to inspect the defendants' land, and dig a trench to ascertain its geological formation, and the notice of motion also asked for leave to do other acts on the defendants' land for the purpose of ascertaining the direction of the natural flow of the water.

The following cases were cited. *East India Company*
* 530 * v. *Kynaston*, (a) *Earl of Lonsdale* v. *Curwen*, (b) *Walker*

(a) 3 Bligh, 153.

(b) 3 Bligh, 168.

v. *Fletcher*, (a) *Attorney-General v. Chambers*, (b) *Bennitt v. Whitehouse*. (c)

The Vice-Chancellor made the following order:—

“Order that the witnesses and agents of the plaintiff N. Ennor be at liberty at all seasonable times, and on giving twenty-four hours’ notice, to inspect such part of the soil and ground within the Chewton Minery, in the occupation of the defendants E. H. Barwell and T. S. Wright, in the pleadings of this cause mentioned, lying to the northward of the Priddy Minery belonging to the plaintiff N. Ennor, as is between the partition wall of the said Priddy Minery on the south, and the pond head or embankment of the basin or reservoir, in the pleadings of this cause also mentioned, on the north; *and that the plaintiff’s workmen, servants, and witnesses be at liberty to make a trench or trenches in the said ground or soil for a distance not exceeding ten yards in length northward from the said partition wall, and not exceeding twenty feet in depth, in order to ascertain the nature of the geological formation of the ground there; and also that the said plaintiff’s witnesses and agents be at liberty at seasonable times, on giving twenty-four hours’ notice, to inspect and view the old swallet or mine-hole near Stock’s house, in the pleadings of this cause also mentioned, and to make sections, models, or plans thereof. And in order to enable such inspection to be made, order that the plaintiff be at liberty to remove the earth and obstructions lying therein, and at the ends, roads, and passages leading thereto; and also that the plaintiff, his servants and workmen, be at liberty, for a width of* * two yards, to cut down the pond head or embankment of the * 531 *said basin or reservoir on that side thereof which is next the Priddy Minery belonging to the plaintiff, to the level of the ground there, and to clear out and remove the weeds and obstructions lying in the course or drain which is in or near the centre of the said basin, for the purpose of ascertaining and evidencing in which way the water in such basin would flow if left to do so in its natural state or channel. And it is ordered that the plaintiff do give to the defendants twenty-four hours’ notice before any inspection or operation under this order, and specify in such notice the names of the persons who are to make such inspection and to perform such operations, the plaintiff, by his counsel, undertaking to abide by any order of the*

(a) 3 Bligh. 172.

(b) 12 Beav. 159.

(c) 28 Beav. 119.

Court as to making good such damage to the defendants, if any, as may be occasioned by *the operations necessary for carrying into effect this order.*"

The defendants moved to vary this order.

Mr. Bacon and *Mr. F. Webb*, for the appeal motion. — We do not object to so much of the order as gives a right to inspect. There is no doubt that the Court, in a case like the present, will give the plaintiff facilities for inspection; but we contend that it will not, at all events on a mere interlocutory application, give the plaintiff liberty to break up the freehold for the purposes of inspection.

Mr. Malins and *Mr. Hanson* appeared in support of the order.

The Lord Justice TURNER asked whether there was any reported case in which the Court had before the hearing allowed a plaintiff to enter upon the defendant's property and break up the * 532 soil for the purposes * of inspection. No case to that effect was produced.

THE LORD JUSTICE KNIGHT BRUCE. — In my judgment those parts of the order which allow the plaintiff to break up the soil of the defendants' land and to remove the weeds ought to be struck out. The rest of the order, it appears, is not objected to.

THE LORD JUSTICE TURNER. — I am of the same opinion. I think it is not according to the course of the Court to make, upon interlocutory application before the hearing, an order authorizing the plaintiff to break up the soil of the defendants' property for the purpose of inspection.

The order was accordingly varied by striking out those parts which are printed in italics.

* *In re* THE NORTHUMBERLAND AND DURHAM * 533
DISTRICT BANKING COMPANY.

LUARD'S CASE.

1860. January 25, 26, 27. March 5. Before the LORDS JUSTICES.

The Joint-stock Companies Act, 1856, has not taken away the liability of the husband of a female shareholder to be placed on the list of contributories in her right in respect of shares belonging to her, but in respect of which he has done no act to make himself a member of the company.

Mrs. L. was, before her marriage, the registered owner of shares in a banking company. Upon her marriage a settlement was executed, by which the shares were assigned to trustees upon trusts excluding the husband, but the trustees did not accept the trusts, and the shares continued registered in the lady's former name. It was not proved that the company had notice of the marriage or of the settlement. The company was afterwards registered under the Joint-stock Banking Companies Act, 1857, and wound up under the Joint-stock Companies Acts of 1856 and 1857.

Held, that the name of the husband in right of his wife must be placed on the list of contributories as well as that of the wife.

Semble, notice to the company of the marriage and of the settlement would not have altered the case.

THIS was a motion on the part of the official liquidator of the company to discharge an order of Vice-Chancellor KINDERSLEY, by which his Honor ordered that the name of Lewis Marianne Luard, the wife of Robert Luard, in respect of her separate estate, be included in the list of contributories, but that the name of Robert Luard be excluded from such list.

Charles John Bigge, the first husband of *Mrs. Luard*, was at the time of his death possessed of 805 shares in this company. He died on the 16th of March, 1846. *Mrs. Luard*, then *Mrs. Bigge*, administered to him. 440 of the shares were sold by her, the remaining 365 were transferred into her name in the books of the company, but she did not execute the company's deed of settlement or any deed of accession to it. She received the dividends upon these 365 shares, and paid in respect of them a call which was made by the company. On the * 17th of * 534 October, 1850, she married *Mr. Luard*. By a settlement which was made upon this marriage these shares, with other

case as the present. That is so as between the parties to the contract, and probably the husband may be entitled to an indemnity out of the wife's separate estate. But the bank made a bargain with its shareholder: how is it to be deprived of the benefit of that by a bargain between the shareholder and some one else? In the next place, his Honor considered that the husband did not come within the definition of a contributory given by 19 & 20 Vict. c. 47, § 65, "any existing or former shareholder upon whom calls are authorized to be made by the third part of this Act,"

the husband being neither an existing nor a former shareholder, though his Honor * 537 admitted that the husband would have been a contributory under the Winding-up Act of 1848. We contend that the practice under the former Act applies; but suppose it does not, though the husband is not a shareholder the wife is; she, therefore, ought to be put on the list of contributories, and she can only be put on along with him. The entry ought to stand as it was before the order appealed against, — Robert Luard and Lewis Marianne his wife in right of the wife.

The only clauses of the deed of settlement which need be referred to as having any possible bearing on the question are the 11th, 26th, 27th, 28th, 29th, and 31st, and they do not seem materially to affect the case. The consent of the directors was made requisite to a transfer *inter vivos*. But no consent appears to have been requisite to enable husbands, assignees in bankruptcy, &c., to become shareholders.

Now to consider the position of the company with regard to the Acts of Parliament. Banking companies were not originally within the operation of 19 & 20 Vict. c. 47 (the Joint-stock Companies Act, 1856). Nor did "The Joint-stock Companies Act, 1857" (20 & 21 Vict. c. 14), in terms apply to them, but "The Joint-stock Banking Companies Act, 1857" (20 & 21 Vict. c. 49), required some banking companies and enabled others to be registered, and provided that the winding-up of companies so registered must take place under those Acts, and not under the Acts of 1848 and 1849. This company was registered accordingly, and therefore is to be wound up under the Acts of 1856 and 1857. Then the 95th section of the Act of 1856 provides that the old practice is to continue subject to rules to be made by the Lord Chancellor.

No such rules ever having been made, sections 59, 60, 61, 64, 65 of the Act of 1856 have some * bearing on the case, * 538 but we submit only a slight one, the case being one of principle and not turning on any critical examination of the wording of the sections. The Act of 1857, 20 & 21 Vict. c. 14, introduced the plan of making creditors parties to the proceedings. The 8th section of 20 & 21 Vict. c. 49 provides that registration under that Act is not to affect the rights and liabilities of the company under pre-existing contracts; if, therefore, an obligation had attached on Captain Luard before the registration, it was not taken away by the registration. Now under the old Winding-up Acts Captain Luard must have been a contributory. *Burlinson's Case*, (a) *Sadler's Case*, (b) *Angas's Case*. (c) Liability to creditors is now a test whether a person is a contributory. On the principles of the Vice-Chancellor's judgment, even if there were no contract for a settlement, the husband would not be liable. The recent Acts contain no negative words providing who shall not be liable to be made contributories. The rights of creditors are saved by section 116 of the Act of 1856, and we submit that the recent Acts do not show any intention to alter the law, so far as to exempt from liability any person who would have been a contributory under the Acts of 1848 and 1849.

Mr. Selwyn and *Mr. Freeling*, in support of the order.—To consider the case, first, independently of the recent statutes, the principle of partnership liability is, "Qui sentit commodum sentire debet et onus." The marriage took place in 1850, so liability in respect of claims before marriage is out of the question; for, by the 62d section of the Act of 1856, the liability ceases after three * years from the time of a person's ceasing to be a share- * 539 holder. The appellant says that the wife continued to be a shareholder, therefore the husband is liable: but neither the deed nor the Acts of Parliament make the husband a shareholder. And testing the case by the above rule, as the husband did not receive, and had not a right to receive, the profits, he ought not to bear the burdens. As between the parties to the deed, the deed contains the law on the subject. Now the deed clearly does not make the husband a partner, except on the terms of his doing certain acts,

(a) 3 De G. & Sm. 18.

(c) 1 De G. & Sm. 560.

(b) 3 De G. & Sm. 36.

which he never did ; nor does personal liability attach on him unless he does those acts. The remedy reserved to the company if the acts are not done is a forfeiture of the shares.

[THE LORD JUSTICE TURNER. — Suppose a call required for the purpose of carrying on the business, how, according to your view, could it be enforced in respect of the shares of a female shareholder who was married ?]

By forfeiture. The shares were considered by the deed as valuable ; it was considered enough to provide for forfeiture : the husband must pay the call or the shares will be lost.

[THE LORD JUSTICE TURNER. — Do you contend that the deed does away with the common-law liability of a husband in respect of claims against his wife ?]

Yes : the deed deprives the husband of his common-law right to his wife's *chose in action* unless certain acts are done, and there is no reason why his liability should not be taken away unless those acts are done. The deed provides that the liability shall attach when the acts are done, which is a negation of its attaching before they are done. Moreover the settlement takes away all the beneficial interest of the husband. *Ness v. Angas (a)* is in our favour.

The case of *Dodgson v. Bell (b)* related to shares acquired * 540 by a * woman before marriage. It was held that a *scire facias* could not be issued against the husband, which governs the present case.

[THE LORD JUSTICE TURNER. — Does not that go on the terms of the Act which gives a *scire facias* only against a " member " of the company ?]

It shows that the husband is not a member. The Winding-up Acts were not intended to enlarge the remedies of creditors, and if Captain Luard is not a debtor at law, he is not one at all. In *Burlinson's Case* the husband had received dividends, which distinguishes that case from the present, but *Dodgson v. Bell* is undistinguishable from it.

(a) 3 Exch. 805.

(b) 5 Exch. 967.

Now as regards the Acts of 1856 and 1857, the 95th section of the former Act does not apply to the present case, for it relates only to remedies, not to rights. The intention of the Act of 1856 was to make the register conclusive as to who should be contributories; by the 19th, an equitable title is not to be regarded; by the 25th, power is given to rectify the register; by the 61st, existing shareholders are to be liable; and by the 65th, calls are to be made upon "any existing or former shareholder." It is urged that creditors are now made parties to the proceedings; that their rights are interfered with; and that injustice will be done if any person liable to them is excluded from the list of contributories. But this is not so; the Acts do not interfere with the rights of creditors against any but contributories. If, therefore, a person not liable to be put on the list is otherwise liable to creditors, they have their remedy at law. Great hardship would arise by making Captain Luard a contributory; he had no right to receive dividends, and he had no power to sell the shares. He therefore would be saddled with a *damnosa hereditas* of which he could not get rid. He clearly was not a partner: he never held himself out as partner to the * world; and he cannot, we submit, be treated * 541 as having incurred the liabilities of a partner.

Sir H. M. Cairns, in reply. — The deed of settlement contained the usual stipulations for payment of calls. Mrs. Luard never executed it, but having received dividends, and been treated as a shareholder, she is in equity liable as such. The remedy by forfeiture given by the deed of settlement is cumulative, and does not take away the effect of the contract to pay. It is argued on the other side that the clauses as to transmission of interests by operation of law take away the common-law liability of the husband in respect of his wife's debts; but it is impossible to stop there; the same rule must apply to personal representatives and assignees in bankruptcy. The deed contains provisions enabling persons claiming in *auter droit* to become shareholders in their own individual capacity, but not a word negating any liability in their representative capacity until they become shareholders.

Then as to the authorities cited. The respondents take up the old banking Act, 7 Geo. 4. That Act enabled a creditor to obtain judgment against the company, and provided a remedy unknown before, that of issuing execution against individual shareholders if

the company could not pay. The legislature thus gave a boon to creditors, and gave it with qualifications. Then cases arose in which it was sought to obtain the benefit of this summary remedy against persons who were subject to liability in respect of the company, but were not properly members of it; and the application was refused at law on the ground that they were not members, but

in each case an application to make them contributories * 542 has succeeded. *Dodgson v. Bell* proceeds * expressly on the ground that the husband was not a member; *Ness v. Armstrong* (a) on the ground that the executor was not a member, but Armstrong was nevertheless put on the list of contributories and retained there on appeal. *Gouthwaite's Case* (b) shows that the rule as to liability to a *scire facias* under 7 Geo. 4, c. 46, does not regulate the liability to be put on the list of contributories. *Straffon's Executors' Case* (c) explains the Act, and shows that it does not provide for the case of equitable liabilities. *Heward v. Wheatley* (d) was a case relating to the same bank, and shows that a person not liable to *scire facias* at common law may be subject to liability in equity. These cases entirely dispose of the authorities cited by the respondents.

Now as to the Acts, the case is concluded by 20 & 21 Vict. c. 49, § 8. The husband was liable to be a contributory under the old Acts, and this liability is saved. But suppose that not to be so, take the definition of a contributory in the 65th section of the 19 & 20 Vict. c. 47, on which the respondents rely. Mrs. Luard is an "existing shareholder." If she were unmarried, she would have to contribute. As she is married, this liability can only be enforced by proceeding against her husband.

Lastly, as regards the settlement, even if the bank had notice of it, which it had not, the case would not be altered. The bank was not bound or allowed to regard trusts. The settlement was a private bargain between the husband and wife, and had no effect as regarded the shareholders. Could a contract to settle a * 543 * wife's leaseholds take away the liability of the husband to the landlord?

Mr. Freeling, on the cases cited, in reply. — Armstrong was put on the list of contributories with a qualification. In *Gouth-*

(a) 4 Exch. 21.

(c) 1 De G., M. & G. 576, 589.

(b) 3 Mac. & G. 187.

(d) 3 De G., M. & G. 628, 646.

waite's Case the executor had produced the probate to the company, received dividends, and signed receipts. In *Straffon's Executors' Case* the only question was as to the liability of the estate of the testator, who was in the strictest sense a shareholder. In *Heward v. Wheatley* the question only was whether the testator who had purchased shares and received dividends had thereby made his estate liable. None of these cases touch the present.

Judgment reserved.

March 5.

The Lord Justice TURNER, after stating the facts, proceeded as follows :—

The order is impeached by the official liquidator, upon the ground that Mr. Luard is liable for the debts of the company, and ought to be put upon the list of contributories. Mr. and Mrs. Luard, on the other hand, contend that Mr. Luard ought not to be put upon the list, for two reasons. First, because he is not, as they insist, liable for the debts of the company, independently of the statutes under which the company is to be wound up; and, secondly, because, as they also insist, whether he is liable or not independently of the statutes, the statutes preclude the Court from putting him on the list.

* This banking company being registered under the * 544 Joint-stock Banking Companies Act, 1857, must, according to section 11 of that Act be wound up, not according to the old Winding-up Acts, but according to the Joint-stock Companies Acts, 1856, 1857. Those Acts are wholly silent on the subject of the list of contributories; but by section 95 of the Act of 1856, 19 & 20 Vict. c. 47, it is enacted, that until rules concerning the mode of proceeding to be had for winding up a company in the Court of Chancery are made (and no such rules have been made), the practice hitherto in use in winding up companies shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding up a company; and it follows, therefore, as it seems to me, that the list of contributories is to continue to be made, and to be made according to the old practice, so far as the same is not inconsistent with the Act of 1856. Now, according to the old practice, the list of contributories included all persons in any manner liable to contribute to the

payment of the company's debts, and Mr. Luard therefore, if liable to the debts, ought, as I think, to be upon the list, unless it can be shown that it is inconsistent with the Act of 1856 that he should be put there. It was argued, however, that Mr. Luard was not liable for the debts of the company. Mrs. Luard, it was said, never executed the deed of settlement of the company, or any instrument by which she came under any liability in respect of the shares, but Mrs. Luard received the dividends upon the shares, and paid the call upon them when she was a widow, and having thus taken the benefit of the deed, she could not, in equity, be permitted to repudiate it; and if she, before her marriage, became subject to the obligations of the deed, Mr. Luard, upon the marriage, became subject to them also; for every husband is liable, during the coverture, for the debts and obligations

* 545 of his wife contracted before the * marriage. This point, as to the non-liability of Mr. Luard, was attempted to be supported by reference to some clauses in the company's deed of settlement, and some cases were referred to in support of the argument on the point; but it is to be observed that the company's deed treats the shares of female proprietors as vesting in their husbands by marriage, as by law they must undoubtedly do, unless they have previously been effectually assigned; and the clauses referred to relate to the husbands becoming members of the company in their personal and individual character, and not to the rights which belong to them in their marital character, otherwise than by way of modified restriction on those rights. The clauses in the deed therefore do not seem to me to affect the question, and the cases which were referred to do not I think apply. They were determined upon the ground that the husbands had not become members of the company within the meaning of the Banking Act, and could not therefore be reached by summary process. In my opinion, therefore, the argument as to the non-liability of Mr. Luard to the company's debts cannot be maintained; and I have the less doubt upon this point, as the Vice-Chancellor does not appear to have at all rested his judgment upon it.

The judgment of the Vice-Chancellor seems to have proceeded wholly upon the ground that the Statute 19 & 20 Vict. c. 47, has confined the remedy of the creditors to the separate estate of Mrs. Luard. His Honor seems to have thought that this statute was

intended to alter, and has wholly altered the law as to liabilities in respect of shares in joint-stock companies. That the statute has made some material alterations in the law upon this subject I agree, but I cannot go the length to which the Vice-Chancellor has gone upon the point. According to his Honor's judgment, if followed out to its legitimate * results, a marriage with a female proprietor of shares would not of itself entail upon the husband any liability in respect of those shares. The statute will have operated to alter the common law as to the liabilities of the husband for the obligations of his wife. This is a result which cannot, I think, have been intended, and which could be effected only by very clear enactments. And upon examining the statute I am satisfied that it was not intended to have, and has not, any such operation. The 19th section indeed, enacts, that every person who has accepted any share, and whose name is entered on the register, and no other person (with an exception which is not material to the present question), shall, for the purposes of the Act, be deemed to be a shareholder; but it does not say that no other person except a shareholder on the register shall be liable for the debts of the company. There is not, I think, any thing further material to the question till we come to the third part of the Act. In that part, by section 61, the existing shareholders are made liable to contribute to the payment of the debts of the company, and the costs of the winding up; but there is no provision for exonerating persons entitled in right of such shareholders from any liability which by law would attach upon them. Again, by sections 62 and 63, persons who have ceased to be shareholders are also made liable, but here also there is the same absence of any exonerating provision. Thus far, therefore, I see no difficulty, but then, by section 65, it is enacted as follows: "Any existing or former shareholder on whom calls are authorized to be made by the third part of this Act is hereinafter called a contributory;" and this enactment certainly introduces some confusion, arising, I think, from the extended meaning attached to the word "contributory" by the old Winding-up Acts; but the word as here used, and this I believe is the first passage in the Act in which it occurs, seems to be used only by * way of definition, with a view * 547 to the interpretation of the subsequent parts of the Act. It is used again in several subsequent sections of the Act, but there

is nothing I think material to be observed with reference to the use of it till we come to the 82d section, which is in these terms: "The Court may, at any time after making an order or decree for winding up a company, and before it has ascertained the sufficiency of the assets of the company, or the debts in respect of which the several classes of contributories are liable, make calls on all or any of the contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts of the company, and the costs of winding it up, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made, may partly or wholly fail to pay their respective portions of the same." Now this section, according to the best interpretation which I can put upon it, seems to me to show what was the meaning intended to be attached to the word "contributory," as used in this Act. It imports, I think, that the calls are to be made upon the existing and former shareholders upon whom calls are authorized to be made by the 61st, 62d, and 63d sections; but so far as I can see it imports nothing affecting or diminishing the liability of those who are by law liable for the debts and obligations of the persons on whom the calls are to be made; nor, so far as I can find, does any subsequent section of the Act impose any such limit. On the contrary, so far as this case is concerned, the company having existed at the time of the passing of the Act in question, and having been afterwards registered, the 116th section seems to save the rights of creditors. In my opinion, therefore, this statute has not altered the law as to the liabilities of husbands, and as, Mrs. Luard having been upon the register, the calls * 548 would properly be made upon her, I * think Mr. Luard, her husband, must be liable in respect of those calls. I think, therefore, that the words "in respect of her separate estate" ought to be taken out of the order, and that both Mr. and Mrs. Luard ought to be placed upon the list of contributories, he being placed upon it in right of his wife. It may be right to add, that the proof of notice does not appear to me to be sufficient, nor am I satisfied that if proved it could affect the question. I think the appellants should take their costs out of the estate, and the respondents should have no costs.

The Lord Justice KNIGHT BRUCE concurred.

[424.]

CARVER v. RICHARDS.

1860. February 9, 10, 15. March 23. Before the LORDS JUSTICES.

In 1813, a married woman who was entitled for life to certain estates, including the L. estate, with a power of appointing them after her death to all or any of her children, appointed them by deed to her eldest son in fee. This appointment was made upon a bargain between the husband and wife and the eldest son, that the estates should be settled, subject to the wife's life-estate, to the use that the husband should receive a rent-charge for his life, and subject thereto to the use of all or any of the children of the marriage as the husband and wife should jointly appoint, or as the wife, if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820, the husband and wife made a joint appointment of the estates among their children, by which they gave the L. estate to the eldest son, and they made slight variations of these dispositions in 1826, reserving on each occasion a power of revocation and new appointment to them jointly and to the wife if surviving. In 1827, the husband died. In 1829, the widow, who had not married again, by a deed not noticing the invalidity of the appointment of 1813, and expressed to be made in exercise of the powers given her by the deeds of 1820 and 1826, or by the deeds recited in them, and of all other powers vested in her, made some slight variations of the dispositions made by the deeds of 1820 and 1826, and subject thereto, confirmed the dispositions of those deeds.

Held, that although the appointment of 1813 was invalid as being made on a bargain for the benefit of the husband, and the appointments of 1820 and 1826 were therefore invalid, as made under a power which was ill created, the original power of the wife was well exercised by the appointment of 1829, and that the title of the eldest son to the L. estate was good.

THIS was a motion by way of appeal from a decision of the Master of the Rolls that a good title had * been shown * 549 to certain property. The question turned on the validity of an appointment by Sarah Carver, made under the following circumstances.

In the year 1813 certain real estates, including an estate called the Llwynpeod estate, stood limited under a settlement dated the 20th of March, 1807, to the use of Sarah, the wife of Daniel Carver, for her life, and after her decease " to the use of all and every, or such one or more, of the children of the said Sarah Carver lawfully begotten or to be begotten, whether by her present or any future husband or husbands, for such estate or estates, interest or interests, and in such parts, shares, and proportions, and with such

limitations over, and charged and chargeable with such annual or gross sums (such limitations and charges to be nevertheless for the benefit or advantage of some or one of the same children), and in such manner and form as the said Sarah Carver, notwithstanding her present or any future coverture, and whether covert or sole, by any deed or deeds, writing or writings, either with or without power of revocation, to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings purporting to be or in the nature of her last will and testament, or codicil or codicils thereto, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses, shall direct or appoint, give or devise the same," and in default of appointment to uses which need not be specified.

By a deed-poll, dated the 16th of July, 1813, reciting the indentures of the 20th of March, 1807, and reciting that Sarah Carver, who was then the wife of Daniel Carver, had then * 550 living Richard Carver, her eldest son, * and several other children, Sarah Carver, in exercise of the above-mentioned power, appointed that the estates should, from and after her decease, remain and be to the use of Richard Carver, his heirs and assigns for ever.

By an indenture of release dated the 19th of July, 1813, grounded on a lease for a year, after reciting amongst other things, the last-mentioned deed of appointment, and reciting that the same had been made in pursuance of an agreement between Daniel Carver and Sarah his wife, and Richard Carver, that the estates should be forthwith settled upon and for the several uses, trusts, ends, intents, and purposes thereafter mentioned, Richard Carver, in pursuance and performance of the said agreement, conveyed the estates to certain trustees to hold the same, subject to the life-estate therein of Sarah Carver, to the use that Daniel Carver and his assigns should, during his life, receive out of the rents, issues, and profits of the estates, for his and their own use and benefit, a yearly rent-charge of 200*l.*, payable quarterly, after the death of Sarah Carver, with the usual powers of distress and entry, and subject thereto "to the use and behoof of all and every or such one or more of the children of the said Daniel Carver, on the body of the said Sarah Carver his wife lawfully begotten, or to

be begotten, for such estate or estates, in such manner and form, and, if more than one, in such parts, shares, and proportions, and with, under, and subject to such powers, provisos, conditions, restrictions, and limitations over, and charged and chargeable with such annual or gross sums (such limitations over and charges to be for the benefit or advantage of some or one of the said children) as they the said Daniel Carver and Sarah his wife, at any time or times during their joint lives, by any deed or deeds, &c., or as the said Sarah Carver (in case she should * survive the * 551 said Daniel Carver, but not otherwise) at any time or times during her life, by any deed or deeds, &c., or by her last will and testament, shall direct, limit, or appoint ;” and in default of appointment, to the uses therein mentioned.

By an indenture dated the 26th of February, 1820, after reciting the above-mentioned instruments, Daniel Carver and Sarah his wife, in exercise of the power given to them by the indenture of the 19th of July, 1813, appointed that after the decease of Sarah Carver, the Llwynypeod estate should go to Richard Carver, in fee ; and they appointed the other estates comprised in the settlement of 1807 (subject to Mrs Carver’s life-estate) to others of the children ; at the same time charging the different estates with sums of money for the benefit of some of the children, partly for the purpose of making provisions for those children to whom no estates were appointed, and partly for equalizing the value of the estates appointed to the different children to whom estates were appointed. By the same deed, Mr. and Mrs. Carver further appointed that the above-mentioned annuity or rent-charge of 200*l.*, secured to Daniel Carver for his life, should be borne and paid by the children out of the rents, issues, and profits of the hereditaments thereinbefore limited to them, in the proportions therein mentioned. And it was further provided, that it should be lawful for Daniel Carver and Sarah his wife, during their joint lives, by deed, with or without power of revocation, and for Sarah Carver, in case she should survive Daniel Carver, but not otherwise, at any time by deed, with or without power of revocation, or by her last will and testament, to revoke the appointment thereinbefore made in favour of the children, and to declare new uses of the property in favour of the children.

* By another deed dated the 18th of July, 1826, Mr. and * 552 Mrs. Carver, after making some slight variations in the

dispositions made by the appointment of 1820, did, subject to such variations, confirm those dispositions, and the several directions, limitations, and appointments in the indenture of the 26th of February, 1820, contained; reserving to Mr. and Mrs Carver, and to Mrs. Carver in the event of her surviving her husband, a power of revocation and new appointment similar to that which was contained in the appointment of the 26th of February, 1820.

Daniel Carver died in the year 1827, leaving Sarah Carver, his widow, surviving him, and she never married again.

On the 16th of May, 1829, Mrs. Carver executed a deed of that date, which recited the deeds of the 26th of February, 1820, and the 18th of July, 1826, and recited that authority was by the last-mentioned deed reserved to Sarah Carver in the event of her surviving Daniel Carver to revoke the appointment thereby made, and to make a fresh appointment of the said hereditaments; and recited the death of Daniel Carver; and recited that, in pursuance of the powers reserved to her for that purpose in and by the said several deeds of appointment, she was desirous of making such alterations therein respectively as were thereafter contained. The deed-poll then proceeded in the following words:—

“Now, therefore, these presents witness, that in pursuance, exercise, and execution of the power or authority, powers or authorities, given, limited, or reserved to me in and by the said two several deeds of appointment hereinbefore mentioned, or either of them, or in or by the several indentures therein respectively recited, and by force and virtue thereof, and of all and every other

* 553 * power and powers, authority and authorities, whatsoever to me belonging, in me vested, or me thereunto in any wise enabling, I, the said Sarah Carver, by this present deed or writing, by me signed, sealed, &c., do revoke and make void so much of the first hereinbefore recited deed of appointment as directed, that, &c.”

The alterations made by this deed were of no great importance, and did not affect the appointment of the Llwynpeod estate to Richard Carver. After making these variations in the previous dispositions, the deed proceeded as follows:—

“And I do hereby ratify and confirm the several directions,
[428]

limitations, and appointments in the first hereinbefore-recited deed of appointment contained, except so much and such part or parts thereof as hath or have been revoked or altered by the secondly hereinbefore-recited deed of appointment, or by these presents; and I also hereby ratify and confirm the several directions, limitations, and appointments in the secondly hereinbefore-recited deed of appointment contained, except so much and such part or parts thereof as hath or have been revoked or altered by these presents."

This deed was executed and attested in such a manner as to satisfy the requisitions of the original settlement of 1807, as well as those of the later deeds. It contained a power of revocation and new appointment; but Mrs. Carver died in 1842, without having exercised that power.

On 5th of July, 1856, Richard Carver agreed to sell the Llwynypeod estate to Richard Richards. Before the title had been accepted the purchaser died, leaving a will, by which he devised his residuary real estate to * the plaintiff in this cause, * 554 who happened also to bear the name of Carver. The plaintiff filed his bill to have the contract specifically performed, and the purchase-money paid out of the personal estate of Richard Richards. The executors insisted that a good title could not be shown. The Master of the Rolls made a decree directing a reference as to title. The chief clerk certified that a good title was shown, and the Master of the Rolls, upon an adjourned summons to vary the certificate, came to the same conclusion (a). The executors moved, by way of appeal, to discharge his Honor's order, and to have it declared that a good title had not been shown.

Mr. Selwyn, Mr. W. D. Lewis, and Mr. Lewin, for the appellants. — The case involves two questions: whether Mrs. Carver had a power to appoint, as she is alleged to have done, and whether, if she had such a power, she had an intention to execute it without reference to what had been done in the mean time. We contend that she had not such intention. She evidently proceeded in the belief that all which had been done was valid, and there is nothing to show what she would have done had she known it to be invalid. She does not expressly refer to the original power; it is not referred to at all unless by force of the general words; and supposing

the previous appointments to be valid, which she treated them as being, it was exhausted. She plainly was only intending to exercise the derivative powers reserved to her by the previous invalid appointments, and to modify the interests given by those appointments. The death of her husband cannot vary the case;

* 555 the element which * made the former appointments bad was in some sense thereby taken away, but that cannot have the effect of making them good, *ex post facto*. The cases do not support the view of the respondents. *Farmer v. Martin*, (a) Sug. Pow., (b) *Askham v. Barker*, (c) *Jackson v. Jackson*. (d) The rule laid down in Sugden on Powers, (e) goes on the footing that the donee of the power is aware of the invalidity of the previous appointments. Without that knowledge, the donee is not a free agent. The Master of the Rolls proceeded on *Wade v. Paget*; (g) but that was a case of supplying the defective execution of a power, and does not at all govern the present case. The mere intention to deal with the property is not enough, her primary object not being to dispose of it, but merely to modify the previous dispositions which she considered to be valid. She could not intend to exercise a power, the exercise of which would assume the invalidity of all that had been done. *Jackson v. Jackson*. (d) The title, at all events, is doubtful, and specific performance should not be decreed. *Pyrke v. Waddingham*. (h)

Collier v. Jenkins, (i) *Blake v. Marnell*, (k) and *Bateman v. Davis*, (l) were also referred to.

Mr. Roundell Palmer and *Mr. Cotton*, in support of the order of the Master of the Rolls. —The only vice in the original appointments was the gift of an annuity to the father: there was not any * 556 bargain between the younger children and the parent. * At the time of the transaction of 1829, the father was dead, so that the annuity was out of the way. The donee of the power having the same power in her, what was there to prevent her rati-

(a) 2 Sim. 502.

(b) Vol. 1, p. 443 (6th ed.); 424 (7th ed.).

(c) 12 Beav. 499.

(d) 1 Dru. 91, 120.

(e) Vol. 1, p. 355 (7th ed.).

(g) 1 Bro. C. C. 363.

(h) 10 Hare, 1.

(i) Younge, 295.

(k) 2 Ball & B. 35.

(l) 3 Madd. 99.

fyng the previous appointments, from which all the invalid parts had by that time been eliminated? She would have done the same thing if she had been told that the former instruments were invalid, for the deed of 1829 shows a deliberate intention to act upon what had been done, though, the previous appointments being in terms revocable, Mrs. Carver must have been perfectly aware that she was at liberty to do away with them altogether. It cannot make any difference whether a person knows that a previous execution of a power is invalid or not, when he knows that at all events he has power to revoke it. Here Mrs. Carver shows a deliberate intention to confirm the material part of what had been done: she unquestionably had power to do so; and it is unreasonable and unnecessary technicality to lay so much stress upon the precise mode of her doing what she had a clear power to do. In *Farmer v. Martin*, the father who had made the previous invalid appointment had not purged himself, he retained the benefit in consideration of which he had made the former appointment, whereas here the substantial vice of the transaction had been eliminated. Similar observations apply to the case of *Askham v. Barker*. The appointment here was right in form, for it referred to all powers. It was right in substance, there being at the time no illegal purpose. The Court is inclined to support any *bond fide* exercise of a power if it can, as is shown by the cases where the invalid part of an appointment has been rejected, the rest being supported. *Crozier v. Crozier*, (a) *Butcher v. Jackson*. (b) The * Court * 557 does not go into nice questions how far the donee of the power may have been influenced.

A sufficient intention on the part of the wife to exercise the power appears. The earlier appointments were voidable in equity, but the donee of the power was not bound to go through the form of revoking the invalid appointment of the legal estate when she had the power of adding to it a good equitable estate, and has done so. The deed of 1820 indicates a feeling that the earlier deeds of 1813 were not sound, and that of 1826 refers back to the original power. There being no fraud in the transaction itself, and there being a sufficient power, all that is necessary is, that there should be on the face of the instrument a sufficient declaration of intention that the persons shall take the property. As to the point urged, that the title is doubtful, it is established by *Macqueen v.*

(a) 3 Dru. & War. 364, 365.

(b) 14 Sim. 444.

Farquhar, (a) and *Green v. Pulsford*, (b) that the mere existence of circumstances which suggest a suspicion does not make a title too doubtful for specific performance to be decreed. Here there is less matter of suspicion than in *Macqueen v. Farquhar*, for we positively show that no person not an object of the power has received or can receive any thing. What ground for suspicion is laid? Nothing can be alleged but that the mother, believing the invalid appointment to be valid, was under a bias. That argument might have had some weight if the invalid appointment had purported to be irrevocable, but she knew that she had power to revoke it. If she had said in terms, "I am advised that the appointment is of doubtful validity, but I wish to confirm it;" surely that would have been good. In *Green v. Pulsford* the circumstances of suspicion were far stronger than in *Macqueen v. Farquhar*. There * 558 are here general * words of reference to all powers in any of the recited deeds, so that the power in the deed of 1807 is included. If at the time of the second appointment there is any person enjoying the benefit of the fraudulent bargain, there must be knowledge that the first appointment is impeachable, otherwise it cannot be set right; but that is not the case here.

Mr. Lewis, in reply. — Lord ST. LEONARDS says, that the donee of the power may, "on discovering the error," make a new appointment. Here there was not any such discovery. An impeachable appointment is not a simple nullity. *Askham v. Barker*. (c) The donee here acted under a strong moral pressure; she had, it is true, a power to revoke as survivor, but she acted under the belief that what had been done was valid, and so did not exercise an independent volition as she might have done, if told that the prior appointment was good for nothing. The deed was not framed to operate as an exercise of the original power; but if it was, there was bias enough to prevent its being good in equity. It could not be a confirmation, there being no intention to confirm. *Honner v. Morton*. (d) It is against principle that where an act is void as being in fraud of a power, it should be held to be confirmed by a subsequent act done without knowledge that there is any thing which requires confirmation.

(a) 11 Ves. 467.

(c) 12 Beav. 499.

(b) 2 Beav. 70.

(d) 3 Russ. 65.

Mr. Cotton, in reply upon *Honner v. Morton*.—In *Honner v. Morton* there was nothing in the nature of confirmation, but merely a recital intended to give notice to the purchaser that a certain encumbrance had * been executed, and that if * 559 it was valid he must take subject to it.

Judgment reserved.

March 23.

THE LORD JUSTICE KNIGHT BRUCE.—The controversy now for decision in this cause is upon the question of the equitable validity or equitable invalidity of a deed of appointment dated the 16th of May, 1829, concerning a real estate in Caermarthenshire, which was executed by Mrs. Sarah Carver after the death of her husband Daniel Carver, who died in the year 1827. There is no fact in dispute, unless so far as from undisputed facts the appellants draw inferences which the respondents say ought not to be drawn. All depends on the true meaning and effect of certain deeds dated respectively in 1807, 1813, 1820, 1826, and 1829, and the effect of the circumstances mentioned in those deeds or in some of them, together with the admitted death of Mrs. Sarah Carver, which happened in the year 1842. The deed of 1829 is that which at the outset I mentioned as dated the 16th of May in that year. The deeds of 1813 are two in number, one dated the 16th, the other the 19th, of July. There are two deeds of 1826, but only one of them seems at present important, that namely of the 18th of July. The nature and circumstances of the several instruments, so far as it can be useful now to state them, were thus. [His Lordship here stated the effect of the several instruments particularly mentioned above.]

The appellants in support of their contention for the equitable invalidity of the deed of 1829 have stated five propositions, the establishment of any one of which, they say, is destructive of the equitable validity of that instrument. * The five prop- * 560
ositions are these: First, they allege that by it Mrs. Sarah Carver ought not to be deemed to have executed or exercised the power of appointment which the settlement of 1807 conferred on her. Secondly, the appellants assert it to be a just inference from the deeds of 1813, 1820, 1826, and 1829, or some of them at least, but especially from the deed of 1829, that neither when Mrs.

Carver determined on executing, nor when she executed, the deed of 1829, did she believe or consider the deeds of 1813 and 1820 or any one of them, or the appointment of 1826, to be equitably invalid, whereas the deeds of 1813 and the appointments of 1820 and 1826 respectively had in truth no validity in equity. Thirdly, the appellants say that her mind must be deemed to have been so far affected by the instruments of 1813 and 1820, and the 18th of July, 1826, that in making the appointment of 1829 she was not sufficiently a free agent to enable her to execute or exercise duly the power conferred on her by the settlement of 1807. Fourthly, the appellants say that the deed of 1829 shows itself to have been based or founded on the deeds of 1813 and 1820, and the 18th of July, 1826, or on some of them, and is therefore in equity destroyed by their equitable invalidity; and, fifthly, the appellants contend that the deeds of 1820 and the 18th of July, 1826, are in effect wholly or partially by the terms of the deed of 1829 incorporated in it and so far tainted that it must on that ground fail. To these five propositions which in a sense were during the argument, and perhaps might be now, reduced to four or three, I proceed to address myself.

And first, as to the first proposition. We are not, I think, bound to suppose that when Mrs. Carver executed the deed of 1829 she had forgotten the settlement of 1807, or its general nature, for of the existence and general nature of that settlement she must be considered to have been in the year 1813, when she executed the appointment of the 16th of July in that year, well aware. In dealing with the case before us we are, in my opinion, bound to attribute to her that recollection in and throughout May, 1829, especially as both the appointment of 1820 and that of 1826 mention the settlement of 1807 specifically. Then is the language of the appointment of 1829 consistent with ascribing to Mrs. Sarah Carver an intention, at the time when she signed, sealed, and delivered it, that it should operate as an instrument exercising and executing the power of appointment conferred on her by the settlement of 1807? I think that it clearly is so. But ought the letter of the deed of 1829 (so viewed) to be deemed consistent with the spirit? I think that clearly it ought to be so. When she signed, sealed, and delivered that deed she intended certainly that the property which it professed to deal with should be held and enjoyed conformably to the apportionment and limita-

tions to which by reference, by confirmation, and otherwise, she professed by that deed to subject it. But from the infirmity, the thorough and obvious infirmity, of the deeds of 1813 and 1830, and the 18th of July, 1826, it was impossible for the deed of 1829 to effectuate that intention unless operating as an appointment under and by force of the power conferred on her by the settlement of 1807. I think, therefore, that according to the spirit equally and the letter of the deed of 1829 it ought to be treated as an appointment in exercise and execution of that power.

It is true that the recital immediately preceding the operative part of the deed of 1829, refers to no power except those of 1820 and 1826 ; but the operative part of the deed of 1829 commences thus : " Now, therefore, these presents witness, that in pursuance, exercise, * and execution of the power or authority, powers * 562 or authorities, given, limited, or reserved to me in and by the two several deeds of appointment hereinbefore mentioned, or either of them, or in or by the several indentures therein respectively recited ;" and proceeds thus, " and by force and virtue thereof, and of all and every other power and powers, authority and authorities, whatsoever to me belonging, in me vested, or me thereunto in anywise enabling ;" nor do I see why, *ut res pereat*, these words should be departed from. The appointments of 1826 and 1820, and the deeds of 1813, were (it needs not be said) equitably invalid, because the deeds of 1813 were made under an arrangement, under a bargain, between the appointee Richard Carver and his father and mother, that Richard Carver should make the settlement of 1813, which gave or professed to give to his father a certain degree of control over the property, and a beneficial interest in it ; and therefore, of course, previously to the year 1829, the power conferred on Mrs. Carver in 1807, had not been to any extent whatever effectually exercised.

Then, as to the appellant's second proposition, I consider that to be altogether immaterial, inasmuch as by the terms, the express language, of the appointments of 1820 and 1826, there was given to Mrs. Sarah Carver a full and complete power, exercisable by deed or will after her husband's death, if she should survive him, of revoking those two instruments respectively. She was expressly and plainly enabled accordingly to deliver herself and the property from each of them after his decease. It is true that, consistently with the instruments executed between 1807 and 1829, she could

not, after the year 1813, make an appointment in favour of a child of a marriage between herself and any other person than Daniel

Carver, but subject, and only subject to that qualification,
 * 563 she, after his death, had merely to revoke * the appointments of 1820 and 1826, in order to obtain the same power of appointment under the deeds of 1813, according to their tenor, as she had under the settlement of 1807. It must also be mentioned that the annuity professed to be conferred on him by the settlement of 1813, was to commence not before her death, and not at all if she should, as she did, survive him; and that every interest professed to be conferred by the deeds of 1813 and 1820, and the appointment of 1826 respectively, which before the year 1829 had not wholly ceased, was an interest that in nature, in extent, and as to the person or persons on whom it was professed or meant to be conferred, or for whom it was expressed or intended to be provided, was not in conflict, but was consistent and in conformity with the settlement of 1807.

As to the appellant's third proposition, I think it destitute of foundation; and with regard to the fourth and fifth, I consider each of them also to be inaccurate and to fail. I am of opinion that it was competent to Mrs. Carver, without damaging the appointment of 1829, to refer in it to the appointments of 1820 and 1826, or either of them, for the purpose of describing and pointing out through that reference any such of the limitations and provisions contained in those instruments, or either of them, as in 1829, she wished to stand and have effect, so far, at least, as those limitations and provisions were authorized by the settlement of 1807 (considered as not affected by any instrument intermediate between 1807 and 1829). Now it is plain and clear, as I understand the matter, that every interest which the appointment of 1829 created, or professed or purported to confer (whether by confirmation or reference or otherwise), was an interest which the settlement of 1807 authorized Mrs. Carver to create or confer;

for if the appointment of 1829 literally taken may be said
 * 564 to confirm * Daniel Carver's annuity, and the joint power or joint powers professed to be conferred on him and herself, that is, I think, merely nothing, inasmuch as Daniel Carver was then dead, and his annuity, therefore, which had never come into possession, could never arise. Consequently, I am of opinion that the appointment of 1829 does not transgress or exceed the

power given to her by the settlement of 1807, and there is, in my judgment, no ground for supposing that in making the dispositions contained (whether by way of confirmation or reference or otherwise) in the deed of 1829, Mrs. Carver was not in every sense a free agent, or had any unfair or improper motive, or was actuated by any unfair or improper reason, or that she would not have made dispositions the same in substance and effect if all or any one or more of the instruments dated between 1807 and 1829 had never existed. She must be taken to have known in and throughout the years 1828 and 1829 that her husband having died, she was, at least from the time of his death, certainly and clearly authorized, entitled, and able substantially and in effect to exercise the power conferred on her by the settlement of 1807, as fully and freely as if none of the instruments of 1813 and 1820, nor the appointment of 1826, had ever existed — subject only to this, that, by those instruments, if valid, she was prevented from making any appointment in favour of any child of a marriage between herself and any other husband than Daniel Carver. But she appears never to have had any other husband than Daniel Carver, and, as I collect, her age at the time of his death, rendered it, if not impossible, at least highly improbable, that, in the event of her marrying afterwards, she should have a child: nor perhaps is it immaterial to remember the power of revocation which the deed of 1829 gave or reserved to her, or the fact that there were at least seven children of Mrs. Carver living * in 1820, and * 565 probably in and throughout 1829 also. My conclusion as to this particular controversy is that of the Master of the Rolls, although it relates to a point of title between vendor and purchaser.

THE LORD JUSTICE TURNER. — I agree in the conclusion at which my learned brother and the Master of the Rolls have arrived in this case. It cannot I think be doubted, that the deed of 1829 operated as an exercise of the powers reserved by the deeds of appointment which were made in exercise of the power created by the deed of 1813, or that the power created by the last-mentioned deed was not well created, but it can, I think, be as little doubted that the deed of 1829 operated also as an exercise of the power created by the deed of 1807, for the deed of 1829 professes to be made in exercise of every power enabling Mrs. Carver to make

the appointment which is made by it ; and so far from there being any thing on the face of the deed to restrain the operation of the general words referring to all powers enabling Mrs. Carver to make the appointment, the deed expressly refers to the powers contained in the deeds recited in the deeds of 1820 and 1826, the former of which deeds recites the deed of 1807. It is impossible, therefore, as it seems to me, to treat the deed of 1829 otherwise than as made in exercise of the power created by the deed of 1807, as well as of the powers created by the deeds of 1820 and 1826. The case, therefore, as I view it, resolves itself into this point: whether the appointment made under the power well created by the deed of 1807, ought to be held bad, because it is mixed up with an appointment made under the powers badly created under the deed of 1813, and I am of opinion that it ought not. It is not necessary to say, nor do I mean to say, that an appointment made under a power well created may not, in some cases, be held

* 566 bad, if made * also under a power which is badly created.

What is vicious may so far predominate over what is good, or the vicious and the good may be so mixed together, that the Court cannot give effect to the one and reject the other ; but I think it is the duty of the Court to reject what is vicious and to maintain what is good, if it can properly be done. The Court, as I apprehend, is bound in such cases to look to the intention of the party executing the power, and to give effect to that intention, if it is not influenced by improper motives. In this case, so far as the appointment of 1829 rests upon the power created under the deed of 1813, it is vicious, not by reason of any improper motive influencing the appointment, but by reason only of the power to make the appointment having been badly created. The motive for acting upon the invalid powers created under the appointment of 1813, rather than upon the valid power created under the deed of 1807, was at an end. The argument that Mrs. Carver may have been influenced by what had been done under the invalid powers is merely speculative. Her intention was to distribute the property in the manner pointed out by the deed of 1829, and I think what is vicious in her mode of carrying out that intention is so far separable from what is good, that her intention must prevail. I am of opinion, therefore, that this appeal must be dismissed.

* WRIGHT v. CHARD.

* 567

1860. March 22, 26. Before the LORDS JUSTICES.

On the death of the tenant for life of an estate in 1849, the estate, according to one view of the construction of a will disposing of it, devolved upon C. as trustee for Mrs. V., according to another view it devolved upon W., a lunatic, the committee of whose estate C. was. Mr. and Mrs. V. entered into occupation of part of the estate, and C. received the rents of the remainder and paid them over to Mrs. V., with full notice that the persons who would, according to the second view of the construction, become entitled on the death of W. intended to assert their title. W. died in 1851. A bill was afterwards filed in 1856 by W.'s personal representative to compel C. to account for the rents received by him. *Held*, that whether C., if he had not been committee of the lunatic, would have been liable so to account or not, his having filled that position made him clearly liable so to account.

THIS was an appeal by the defendant Chard from a decree of Vice-Chancellor KINDERSLEY which directed an account of rents against him.

The estate in question had been devised in settlement by Sir Thomas Samwell, who died in 1779. Upon his death, the ultimate reversion in fee descended upon his coheiresses Millicent Drought, Maria Langham, Frances Ann Langham, and Phillis Langham; and on the death of Maria Langham intestate and without issue in 1798, it became vested in Millicent Drought, Frances Ann Langham and Phillis Langham as coparceners.

Millicent Drought married, and died in 1808, upon which her share in the reversion devolved upon her son Thomas Fuller Drought Samwell.

Phillis Langham died in 1828, and Frances Ann Langham in 1830. Each made a will devising her share in the reversion to Frances Drought and Juliana Drought for their lives and the life of the survivor, with remainder (after certain intermediate limitations which failed of taking effect) "to the right heirs of Sir Thomas Samwell by Mary, the daughter of Sir Gilbert Clarke, for ever."

The above-named Thomas Fuller Drought Samwell * was * 568 the last tenant for life under Sir Thomas Samwell's will; and, upon his death in 1843, the reversion came into possession,

all the estates limited by the will having determined or failed. Upon the death of Thomas Fuller Drought Samwell, Frances Drought, and Juliana Drought entered into possession of the two-thirds devised by the wills of the Misses Langham. Frances survived Juliana, and died in 1849.

Upon the death of Frances Drought, the question arose, — what was the effect of the ultimate limitation in the wills of the Misses Langham? Assuming it to have amounted to a devise in fee, then, at the death of Frances Drought, the two-thirds of the estate which were devised by those wills devolved (by means of intermediate steps which need not be specified), upon the defendant Chard, upon trust for Mrs. Vernon for life, for her separate use; and after her death upon the other trusts declared by a will under which they became vested in him. If, on the other hand, the ultimate limitation in the wills of the Misses Langham created a *quasi* estate tail as in *Mandeville's Case*, (a) the result was, that, upon the death of Frances Drought, Atherton Watson became tenant in tail in possession of these two thirds. He had been found a lunatic, and the defendant Chard was the committee of his estate. Atherton Watson died in 1851 without issue.

During the interval between the deaths of Frances Drought and Atherton Watson, Chard received the rents of two-thirds of the estate, except a part of it, of which Mr. and Mrs. Vernon were in actual possession, and with full notice of the question as to the title, and that the persons who, on the supposition that an
* 569 estate * tail had been created, would, on the death of Atherton Watson without issue, become entitled in possession, were prepared to enforce their claims, he paid these rents over to Mrs. Vernon.

In 1852 the plaintiff, who had become entitled to one moiety of the two-thirds devised by the Misses Langham (assuming the ultimate limitation to have created an estate tail), filed his bill to establish his title. On the 13th of August, 1854, Vice-Chancellor KINDERSLEY made a decree in his favour: *Wright v. Vernon*; (b) and it was affirmed on appeal by the House of Lords. (c)

The plaintiff then having taken out administration to the estate of Atherton Watson, filed his bill in this suit in 1856, against Chard and Mr. and Mrs. Vernon, seeking to have an account of

(a) Co. Litt. 26 b.

(b) 2 Drew. 439.

(c) 7 H. L. Cas. 35.

the rents received during the life of Atherton Watson, and to make both Chard and the separate estate of Mrs. Vernon (who had other property settled to her separate use) liable for them. Vice-Chancellor KINDERSLEY (a) dismissed the bill with costs as against Mr. and Mrs. Vernon, so far as it sought to charge Mrs. Vernon's separate estate, but directed an account of rents against Chard, and charged Mr. Vernon with an occupation rent for that part of the property which he had occupied during the life of Atherton Watson. No further direction was given as to costs.

Chard appealed against this decree so far as it affected him.

Mr. Glasse and Mr. Smythe, for the plaintiff, in support of the decree. — * Chard stood in the position of a *quasi* * 570 trustee for the lunatic, and, with full notice of the question as to the title, received the rents of what is now conclusively settled to have been the lunatic's property. Under these circumstances, he cannot now be heard to say that he received the rents otherwise than on behalf of the lunatic, and he is clearly liable to account.

¶ *Mr. Baily and Mr. Renshaw*, for the appellant. — If the appellant had not been committee of the lunatic, this would have been a clear case of adverse possession against the lunatic. Chard was holding two-thirds of the estate on behalf of Mrs. Vernon, and, as her trustee, Atherton Watson would have had no remedy against him but by ejectment and an action for mesne profits; and no ejectment having been brought in Atherton Watson's lifetime, no action for rents received in his lifetime could be brought at all, unless perhaps under 3 & 4 Will. 4, c. 42, § 2, and the period limited by that section expired without any proceeding being taken. There is no authority in support of the view that the representatives of a deceased person who has been out of possession, and has not brought ejectment, can maintain an action for mesne profits. There would therefore be no right at law. The fact of Chard's being committee will not, we submit, induce a Court of Equity to interfere. Chard held under a legal title adverse to that of Atherton Watson, and was in adverse possession. The demand is purely legal, and is bad at law. An account of rents is usually

restricted to the time since the filing the bill : *Hicks v. Sallitt* ; (a) *Thomas v. Thomas* ; (b) and so here ought not to be directed at all.

A reply was not called for.

* 571 * THE LORD JUSTICE KNIGHT BRUCE. — Except as to the question of costs, a point on which *Mr. Glasse* is entitled to be heard, the decree appears to me right ; so plainly right that in one sense in which the expression “undefended cause” is used, this is in my judgment an undefended cause. Perhaps I should have thought the decree right as regards the account, if *Mr. Chard*, instead of being the committee of the lunatic’s estate, had been a stranger ; but considering the union of characters in him, the propriety of the decree appears to me not open to any serious argument. So far as regards the account the decree will be affirmed, and the appellant will be ordered to pay the costs of the appeal. Whether any variation ought to be made in the decree as to the question of costs is a point on which *Mr. Glasse* will be heard.

THE LORD JUSTICE TURNER. — In disposing of this case, I adopt the language of Lord ELDON in *Pulteney v. Warren*, (c) “If I was obliged to decide whether this claim could be supported upon the general principle, I should wish to hear the case further argued before I should venture to introduce a new decision upon this subject. But I am relieved from that by the special circumstances of this case, which makes it unnecessary to decide upon the general principle.” I therefore do not enter upon the question whether there is any right to recover against *Mr. Chard* in equity independently of the particular position in which he stood, but considering his position, I have no doubt that he is liable to be called upon to account here. The proposition that where there is a legal right there is no remedy beyond the remedy at law is generally

* 572 true, but that rule * does not apply to a case like the present. Where the circumstances of a case are such as to bring it within the jurisdiction of a Court of Equity, it does not follow because the remedy at law is gone, that the equitable remedy is also gone. Here *Mr. Chard* filled two characters ; he united in himself two different titles, that of committee of the lunatic’s estate,

(a) 3 De G., M. & G. 801. (b) 2 K. & J. 79. (c) 6 Ves. 72, 89.

and that of trustee for Mrs. Vernon, and he took upon himself to decide to which he would give the preference. He decides erroneously: Is that erroneous decision to alter the rights of the parties? He was wrong in taking upon himself to decide the question, and he must bear the consequences of his erroneous decision. The respondent must have his costs of the appeal; but as to the costs before the Vice-Chancellor we will hear a reply.

Mr. Glasse, in reply. — Mr. Chard has throughout taken upon himself to act for Mrs. Vernon, and against the lunatic, and there is no reason why the costs should not follow the result. The suit has been made necessary by his choosing to decide a question against a person towards whom he stood in a fiduciary position.

THE LORD JUSTICE KNIGHT BRUCE. — With as much confidence as any one can feel when differing from so eminent a Judge as the Vice-Chancellor KINDERSLEY, I think that Mr. Chard must pay the plaintiff's costs, except so far as they have been increased by his endeavour to charge the separate estate of Mrs. Vernon.¹

The Lord Justice TURNER concurred.

* PEARCE v. LINDSAY.

* 573

1860. April 19. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The general rule, that upon taxation of costs as between party and party, the briefs of more than two counsel shall not be allowed, is not inflexible.²

THIS was a motion by way of appeal from the decision of Vice-Chancellor WOOD, reported in Mr. Johnson's Reports, (a) declaring that in taxing the costs of suit as between party and party two only of the three counsel retained by the plaintiffs upon the hear-

(a) Page 702.

¹ See 1 Dan. Ch. Pr. (4th Eng. ed.) 113, and cases in note (3), 2 ib. Add. ii.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1440, and note (2).

ing of the appeal in this case could be allowed, and referring it back to the taxing master to review his certificate allowing the costs of the three counsel.

At the original hearing the plaintiffs appeared by two counsel, but on the defendants' appealing, the plaintiffs retained an additional queen's counsel, and before the taxing master it was submitted on behalf of the plaintiffs, that the examinations and depositions taken in Chambers under the decree had increased so much the bulk of the evidence which it became necessary to submit to the Court of appeal, that this addition was requisite for the purposes of justice.

The taxing master acceded to this view, and by his certificate allowed the costs of the three counsel retained by the plaintiffs on the appeal, stating that, on the ground of the peculiar difficulty and importance of the case and the bulk of the pleadings and evidence before the Court upon the appeal, he considered that the case was one in which an exception might properly be made to the general rule allowing the costs of two counsel only, laid down in *Smith v. The Earl of Effingham*. (a)

* 574 * *Mr. W. M. James* and *Mr. E. R. Turner*, in support of the appeal motion. — There is no such rule as that supposed to have been laid down in *Smith v. Effingham*, (a) but it is altogether matter of discretion whether the costs of two or more counsel should be allowed. If, however, the rule be held to exist, it is not an inflexible rule, admitting of no exception. All the authorities in which the rule is referred to as existing admit that it is open to exception on the ground of the nicety and difficulty of the question to be determined, the bulk of the pleadings and evidence in the cause, or for other reasons. *The Midland Railway Company v. Brown*, (b) *Davis v. The Earl of Dysart*. (c) In taxing the costs of an appeal before the House of Lords, the costs of three counsel are allowed where the nature of the case renders it proper to retain three counsel, although two only are allowed to address the House.

Mr. G. M. Giffard and *Mr. H. Cox*, for the defendants. — Wherever the cause has been a contested one, and the costs have been

(a) 10 Beav., 378.

(c) 21 Beav. 124.

(b) 10 Hare, App. xlv.

taxed as between party and party, three counsel have been invariably, with one single exception, disallowed. The question upon taxation of costs as between party and party is, whether the party who fails ought to pay more costs than have been necessarily incurred by his opponent. Without going the length of saying that there may not be cases in which a party might be allowed the costs of more than two counsel, the general rule is not to allow them, and that rule would appear to be applicable upon an appeal, even * more than upon an original hearing, because the * 575 counsel may be supposed to be then more familiar with the details of the case. *Attorney-General v. Munro.* (a) The single instance in which an exception to the general rule was made is in *Carter v. Barnard*, (b) but in that case the counsel who drew the pleadings had become a queen's counsel before the hearing of the cause, and it was considered necessary to retain him at the hearing. There is no such ingredient in the present case, and the mere bulk and volume of the pleadings and evidence has been held not to be a sufficient ground of itself for a departure from the general rule. *Green v. Briggs.* (c) The reason why the rule is different from that which prevails in Courts of Law is that in Courts of Equity there is no jury. It is submitted that the Vice-Chancellor's conclusion is the right one, and that if two counsel were deemed sufficient at the original hearing, they must also be considered sufficient on the appeal.

Mr. W. M. James, in reply.

THE LORD CHANCELLOR. — There is no doubt that the general rule is to allow only two counsel as between party and party, but the question is, whether that rule is an inflexible one; and those who affirm that the taxing master did wrong in allowing three counsel, ought to prove it to be inflexible and without any exception. Now instead of that, in each and every one of the authorities cited it was allowed that there may be an exception. It was so in *Smith v. The Earl of Effingham*, (d) *The Attorney-General v. Munro*, (a) *The Midland Railway Company v. Brown*, (e) and other authorities cited.

(a) 1 Mac. & G. 213; 1 Hall & Twells, 457.

(b) 16 Sim. 157.

(d) 10 Beav. 378.

(c) 7 Hare, 279.

(e) 10 Hare, App. xliv.

That being so, instead of being proved that the rule admits of no exception, it is allowed that the authorities say there may be an exception. It would be very unreasonable, I think, if there might not be an exception, because there are cases in which justice could not be done, in which the Court would not have the proper assistance which it has a right to expect, with two counsel however learned. Upon the hearing of the appeal in this case the evidence extended over 7,050 folios selected from a larger mass of evidence. That evidence is very conflicting, consisting of a correspondence carried on for years, and of extracts from the books of the contending parties, having reference to the various important questions involved in the suit. One of those questions has been argued before us to-day, and upon it we have taken time to consider our judgment. If there is any case in which an exception to the rule should be allowed, it is this. The only argument urged against it has been that the plaintiffs were content with two counsel upon the argument below. But surely that objection cannot be allowed to prevail. We do not know for what reason not more than two counsel were then employed, nor what effect the severe labour they undertook may have produced upon them. We must, I think, dismiss from our consideration the circumstance of there having been only two counsel employed below. Upon the appeal we have heard three counsel on each side, and in my opinion with great advantage. My conclusion, therefore, is that the taxing master's certificate was right.

* 577 *THE LORD JUSTICE KNIGHT BRUCE. — I also think the counsel employed upon the original hearing were over-weighted.

THE LORD JUSTICE TURNER. — I agree with what has been said, but with the anxious desire that it should still be borne in mind that, as a general rule, the costs of two counsel only should be allowed, and that, before the costs of three are allowed, it should, in each case, be clearly shown to have been essentially necessary, for the purpose of doing justice between the parties at the hearing of the cause, that three counsel should be employed.

Mr. W. M. James asked for the costs of the original appeal from the decision of the taxing master.

THE LORD JUSTICE TURNER.—I think the costs below should be given.

THE LORD CHANCELLOR.—I agree.

* CONYBEARE v. THE NEW BRUNSWICK AND * 578
CANADA RAILWAY AND LAND COMPANY, LIM-
ITED.¹

1860. February 27, 28, 29. March 1, 2, 5. April 26. Before the LORDS JUSTICES.

The plaintiff being desirous of purchasing from the directors of a colonial company some forfeited shares, applied at the office for information about the company. Grants of land, appearing on the face of them to be absolute, had been made by the colonial government to the company. The secretary showed these grants to the plaintiff, and handed him the last two reports of the company, both of which proposed dealing with the land in a way which assumed it to belong absolutely to the company. An Act had been passed containing a clause defeating the title of the company to the land, if the railway, which was still unfinished, was not completed by a given time. There was some question whether later Acts did not control the operation of this clause, but the company had been advised by counsel that they did not. This opinion was not communicated to the plaintiff, nor was he informed of there being any question whether the title was defeasible. The secretary handed him a complete bound-up copy of the Acts relating to the company, which he there and then cursorily looked at, but did not notice the Act containing the divesting clause. He proposed to return and look at the Acts more carefully, but the secretary gave him another bound-up copy of the Acts to take away, and he therefore made no further examination of the set first shown him. The copy which he took away did not contain the Act in question. The plaintiff some days afterwards made, through the secretary, a proposal to purchase shares, which was accepted by the directors, and the purchase was duly completed. After this the plaintiff discovered the imperfection of the title. *Held*, that the showing to the plaintiff these reports and grants amounted to a representation that the title of the company to the land was indefeasible, and that having regard to these representations, and to the omission of the divesting Act from the set which the plaintiff took away, he was not to be considered as furnished with sufficient means of discovering the truth.²

¹ S. C. reversed in House of Lords, 9 H. L. Cas. 711.

² See *Rawlins v. Wickham*, 3 De G. & J. 304; *Reynell v. Sprye*, 1 De G., M. & G. 660, 710; *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 233, note; *Smith v. Reese River Co.*, L. R. 2 Eq. 264; S. G., L. R. 2 Ch. Ap. 613; *Central*

Held also, that the purchase being a purchase from the directors, and the secretary being the agent of the directors in the matter of the sale, the company were liable for the misrepresentations, and that the plaintiff was entitled to have the contract rescinded.³

Held, that such right was not lost by the fact that the plaintiff, before the bill was filed, rested his right to rescind solely upon another ground, upon which the Court did not decide in his favour.

The reports shown to the plaintiff stated the monthly traffic returns from the completed part of the line to exceed the expenditure. This was true at the time of the report, but since that time the expenditure had almost always exceeded the returns. This fact was not mentioned to the plaintiff. Whether this suppression would not have entitled him to relief, *quære*.⁴

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor STUART dismissing his bill, which was filed for the purpose of setting aside a purchase made by him of 200
* 579 class (A) shares in the New Brunswick* and Canada Railway and Land Company, and of recovering his purchase-money with interest.

The New Brunswick and Canada Railway and Land Company was formed in 1856, on the principle of limited liability. Its object was to take a transfer of the undertaking and rights of the St. Andrews and Quebec Railway Company, and of the rights of the (A) shareholders in that company.

The St. Andrews and Quebec Railway Company was a company

Railway Co. of Venezuela *v.* Kisch, L. R. 2 H. L. 125; S. C., 3 De G., J. & S. 122; Kerr *Inj.* 39; Kerr *F. & M.* (1st Am. ed.) 77.

³ See *New Brunswick &c., Railway &c., Co. v. Conybeare*, 9 H. L. Cas. 711; *Nicol's Case*, 3 De G. & J. 387, 437; *Kerr F. & M.* (1st Am. ed.) 111-118; 1 *Sugden V. & P.* (8th Am. ed.) 2, 248, 250, and notes; *Udell v. Atherton*, 7 H. & N. 172; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Veazie v. Williams*, 8 How. (U. S.) 134; *Elwell v. Chamberlain*, 31 N. Y. 611; *Bennett v. Judson*, 21 N. Y. 238; *Mundorf v. Wickersham*, 63 Penn. St. 87; *Lawrence v. Hand*, 23 Miss. 103; *Concord Bank v. Gregg*, 14 N. H. 331; *Mitchell v. Mims*, 8 Texas, 6; *Bowers v. Johnson*, 10 Sm. & M. 169; *Mason v. Crosby*, 1 Wood. & M. 342; *Morton v. Scull*, 23 Ark. 289; *Griswold v. Haven*, 25 N. Y. 595; *Coddington v. Goddard*, 16 Gray, 436; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Ranger v. Great Western Railway Co.* 5 H. L. Cas. 86; *National Exchange Co. v. Drew*, 2 Macq. 125; *Meux's Executor's Case*, 2 De G., M. & G. 522; *Henderson v. Railroad Co.*, 17 Texas, 560; *Litchfield Bank v. Peck*, 29 Conn. 384; *Custar v. Titusville Water & Gas Co.* 63 Penn. St. 381; *River v. Plankroad Co.*, 30 Ala. 92; *Crump v. United States Mining Co.*, 7 Grattan, 352; *East Tenn. Railroad Co. v. Gammon*, 5 Sneed, 567; *Hester v. Memphis &c. Railroad Co.*, 32 Miss. 378; *Oakes v. Turquand*, L. R. 2 H. L. Cas. 325.

⁴ See *per Lord WESTBURY* L. C. 9 H. L. Cas. 728.

formed under an Act of the New Brunswick legislature for making a railway from St. Andrews to Quebec, but by a later Act it was declared to be entitled to the privileges mentioned in its original Act upon completion of the line from St. Andrews to Woodstock, those privileges having originally been conditional upon its completion to Quebec. Certain grants of land were made to the company at different times by the New Brunswick government, and the government also guaranteed a dividend of 6l. per cent on 100,000l., part of the capital, for twenty-five years from the completion of the line to Woodstock. The (A) shareholders in the company were entitled to the benefit of the grants and of the guarantee. The grants, which were produced in Court on the hearing of the appeal, were on the face of them absolute grants, reserving to the Crown all mines of gold, silver, and coal, but not in any way conditional or defeasible. A subsequent Act, 19 Vict, c. 69, § 2 (New Brunswick), contained the following clause :—

“If the part of the contemplated St. Andrews and Quebec Railroad, which may be between St. Andrews and Woodstock, and also a branch thereof to the river St. Croix, at or near the ‘ledge’ (so called), in the parish of St. Stephen, in the county of Charlotte, be not completed and in full operation within the space of four years from * the time (a) when this Act * 580 comes into operation, all and every the grants of land and the rights and privileges conferred by the several facility Acts relating to the company shall be utterly null and void, and the land and privileges shall revert to and vest in her Majesty as if no grant had been made or rights and privileges conferred.”

In 1856 the Canada and New Brunswick Company was formed as stated above. The memorandum of association stated its objects in the following terms :—

“The objects for which the company is established are, to accept a transfer of the undertaking of the St. Andrews and Quebec Railroad Company, and to purchase all the lands, property, rights, and expectancies of the said railroad company, and the lands, rights, and expectancies of the class (A) shareholders of the St. Andrews and Quebec Railroad Company ; and to carry the

(a) 21st August, 1856.

said undertaking, or any part thereof, or any branches or deviations or extensions of the said railroad, into execution ; and to appropriate the said lands amongst the shareholders in the company hereby established, or otherwise dispose thereof; and to acquire and appropriate and dispose of any other lands in the province of New Brunswick ; and to advance funds or to take shares in the said railway company and class (A) to enable such company to carry on their undertaking until the same shall be transferred as aforesaid to the company hereby established ; and to obtain Acts of the imperial Parliament and of the legislative council and assembly of New Brunswick in that behalf."

The articles of association provided for the division of
* 581 * the capital into class (A), class (B), and class (C) shares, and proceeded as follows : —

" The capital shares herein referred to shall be of 20*l.* each, and the land shares shall specify the number of acres to which each share relates, and such number shall, with reference to the whole quantity of land which the company shall receive, be read to specify the proportionate quantity to be received on division, and not the positive quantity to be claimed. Class (A) shall consist of 4000 shares, and shall be entitled to the guarantee of 6*l.* per cent interest thereon for twenty-five years, pursuant to the above-recited Act of the legislative council and assembly in that behalf. The company shall allow interest at 6*l.* per cent per annum on the first payment, and calls on class (A) shares from the time of payment until the opening of the railroad from St. Andrews to Woodstock for traffic. Each class (A) share shall be entitled to a certificate for an allotment and appropriation of four acres of the lands of the company, as hereinafter mentioned."

The class (B) shares were to have interest at 5*l.* per cent upon the payments which were made upon those shares, and they were to have fifteen acres of the land of the company. Class (C) shares were to comprise such part of the remaining capital of the company as the directors should think fit ; and the 4000 original class (A) shares in the St. Andrews and Quebec Railroad Company were provided for by the articles in this manner : —

“ 4000 shares of this class ” (that is, (C)) “ are to be allotted to the class (A) shareholders of the St. Andrews and Quebec Railroad Company in exchange for the 4000 of the original (A) shares now held by them, but not to be entitled to interest during construction. The last-named 4000 shares are to be entitled to an allotment and appropriation of 42,670 acres of the lands of the company, in addition to the 20,630 acres already granted to them, and also of all the residue (if any) of the lands * of * 582 the company arising from the grant already promised between St. Andrews and Woodstock, after making the several allotments aforesaid, and realizing from the sale of further lands so much money as will repay to the company the interest paid to the classes (A) and (B) during construction. Of this total of 63,300 acres of land, 3300 belong to shareholders who at the half-yearly meeting of the said class (A) company on the 7th February, 1856, held only capital stock shares, and had not themselves sold off the corresponding land shares. Each of the shareholders entitled to land shall receive not only a certificate of the shares held by him, to be called ‘ capital shares,’ but also a separate certificate, to be called ‘ land shares ;’ and the company shall from time to time allot the lands.”

These articles having been executed, a transfer was made of the undertaking of the St. Andrews and Quebec Company to the New Brunswick and Canada Company, upon terms which need not be specified, and it was confirmed by an Act of the imperial legislature passed in August, 1857.

At the time of the formation of the Canada and New Brunswick Railway Company, the St. Andrews and Quebec Railway Company had already formed twenty-five miles of the railway from St. Andrews up the country ; and immediately upon the formation of the New Brunswick Company they completed fifteen miles more ; and on the 1st of October, 1857, the railway was opened from St. Andrews to a place called “ Barber Dam,” a distance of forty miles. The New Brunswick Company then proceeded to carry on the line for twenty-five miles more, from Barber Dam to Howard’s Settlement ; and in the month of December, 1857, the directors of the company made their usual half-yearly report to the shareholders, * which report stated, among other things, that * 583 “ the directors have to congratulate the shareholders on the

opening of the line to the fortieth mile from St. Andrews to Barber Dam. This took place on the 1st of October last, when the train started with six hundred passengers, including several members of the provincial government and most of the leading families of the district. The statements previously made as to the cheapness of construction have been fully borne out by an investigation of the total cost of the forty miles now open." Then there followed a statement that the works were being proceeded with, and that the engineer had given a full and clear description of the extension in the subjoined report, and from his detailed estimate the costs would be as follows. Then there was a statement of the different expenses, bringing the cost to 2617*l.* per mile. The report proceeded : —

"The survey of the remainder of the line to Woodstock has also been completed, as will be seen by the engineer's report, and, contrary to the expectations of your directors, the works turn out to be even more favourable than the previous portions of the line. According to the detailed estimate of Mr. Buck, the cost of this last portion of the line will be as follows."

Then followed an estimate showing the cost of the portion there spoken of to be 2300*l.* per mile ; and after referring to other matters, the report proceeded : —

"Your directors stated in their last half-yearly report that they were in expectation of receiving from the government of New Brunswick a grant of land, and that it was their intention to make arrangements for disposing of the timber during the next season. They have now the satisfaction to report that those expectations have been fully realized, and that the New Brunswick government have shown their perfect satisfaction with the progress of the works by transmitting 18,000*l.* on account of their stock in this * 584 undertaking, and by granting to the company * 20,000 acres of land, which is now being surveyed, accompanied by an assurance that a further grant will be made as soon as it is required by the company for the purposes of settlement. Your directors have reason to believe that a revenue will speedily be obtained from the sale of the least valuable portion of the timber on the company's land ; the manager, in a recent communication,

having stated that he could realize a profit of about 13,000*l.* from the sale of 60,000 cords of firewood, and that certain parties from the United States had offered to contract for 1,000,000 of sleepers to be sent to Cuba, from which he can secure a further profit of from 13,000*l.* to 14,000*l.* Arrangements are also in progress for disposing of the company's land."

Then there was this further statement: —

"The disparity which exists between the small cost of this line and the larger costs of similar undertakings has led many parties to believe that the liabilities are accumulating, which at some future time will be brought against the company. To remove any apprehension of this kind, your directors think it right to state that the system of payment adopted in the province involves the liquidation of every claim once in six weeks; so that when the certificate of the engineer and the accounts forwarded by the manager are settled, the capital account is virtually closed up to that time, and in this way arrears of every kind are most effectually prevented."

A balance-sheet was appended to this report, on which there appeared to be a balance of 2600*l.* in hand in favour of the company; and there were also appended original and supplemental reports of the engineer, containing detailed statements of the cost of the line, and bringing the estimated cost of work required to be done to complete the line to the fortieth mile to 2310*l.* Then the estimated cost of the twenty-one miles section to Deer Lake (a station further on the line than Howard's Settlement) was made to be 42,395*l.*, being equal to 2019*l.*

* currency per mile, or 1682*l.* 10*s.* sterling; and the ap- * 585 proximated estimate of construction of twenty-four miles and a quarter from Howard's Settlement to the Woodstock Road was made to be 1638*l.* currency per mile, or 1365*l.* sterling.

The New Brunswick Company, after December, 1857, proceeded with the line, and in July, 1858, at the third annual meeting, the directors made another report, which, among other things, contained this statement: —

"With respect to the property of the land-shareholders, the directors have great satisfaction in reporting that not only has the deed of grant of 20,000 acres of land referred to in the last report

been received, but the New Brunswick government has given to the company a further grant of 30,000 acres, which are now under survey. The expectation which the directors had of making a contract for a large quantity of sleepers has not been realized, the great depression of the timber trade rendering it unsafe to do so. The directors have not, however, been unmindful of the advantage to be derived from bringing the land into immediate profitable operation. They have instructed the manager to be prepared to grant lumbering licenses during the ensuing winter, and he is now in communication with parties in America who propose to take certain quantities of timber from your lands each year for a period of five years; in addition to which, parties from Bangor have renewed their applications respecting large lumbering contracts."

Then they referred to favourable communications which they had received from the engineer as to the value of the land attached to the railway, and stated that they had hoped to have laid before the shareholders a sufficiently digested plan for carrying out their wishes in reference to the land company, but that the opposition to the bill in Parliament, which was a bill for the complete
 * 586 * amalgamation of the two companies, had altered the position of affairs, and that further time was therefore required to mature a scheme which would be mutually beneficial to all parties. A balance-sheet was appended to this report, showing a balance to a small amount in favour of the company.

In May, 1858, the company had taken the opinion of Mr. Buller upon the question whether the lands comprised in the grants were subject to be forfeited on non-completion of the line to Woodstock within the period prescribed by the clause of 19 Vict. c. 69, above set out. His opinion was as follows:—

"I am of opinion that under the Facility Act of the 19 Vict. c. 69, and notwithstanding section 7 of that Act and the Act 19 Vict. c. 70, the land in question is liable to forfeiture if the line to Woodstock and the branch to the river St. Croix be not completed and in full operation by the 1st of August, 1860."

In August, 1858, the plaintiff became desirous of purchasing some class (A) shares in this company, and on the 20th of that month he applied at the office of the company for information, and

had an interview with the secretary. There was a conflict of evidence as to much of what passed on this occasion, the plaintiff and the secretary evidently not having the same understanding of the effect of some of the verbal communications. The Lord Justice TURNER, in giving judgment, entered into a very long and elaborate investigation of the evidence, and the following short statement comprises the substance of the conclusions of fact which his Lordship considered to be established by it.

The plaintiff alleged that misrepresentations were made to him by the secretary as to the rights of the * class (A) * 587 shareholders, and also as to the state of the affairs of the company as regarded the prospect of their being able to complete their line in due time. The conclusion which his Lordship drew from the evidence was that there had not been any such misrepresentation as to the class (A) shares, and that as to the prospect of completing the line, the secretary had spoken merely as to his belief, and not positively; that there was no intention on either side to misrepresent what passed, but that the parties had not rightly understood each other. Another branch of the plaintiff's case was that there had been a suppression of the Act 19 Vict. c. 69 above referred to. It appeared that one or more grant or grants of land from the government of New Brunswick to the company, appearing upon the face of them to be absolute, were produced by the secretary to the plaintiff, and that the reports of 1857 and 1858, showing that the company proposed to deal with those lands, were handed to the plaintiff, who took them away. It further appeared that the Acts prior to the 19 Vict. c. 69 had been bound up, and that several copies of them were kept. Into two of these copies which were kept for the use of the directors and the solicitor of the company this later Act had been pasted. One of these two bound copies was produced to the plaintiff by the secretary, and then and there examined by him. The plaintiff deposed that his examination was only cursory, and that he proposed to return and examine them again on a future occasion. This was not contradicted. The secretary, in order that he might examine the Acts at leisure, gave him another bound copy to take away, but this copy did not contain the later Act. The secretary deposed that he had offered to the plaintiff a separate copy of this Act, but his Lordship considered that this was not established and that it was not shown that the plaintiff's attention was

* 588 in any way called to that Act, * or to the question whether the title to the land was defeasible.

Another ground on which the plaintiff relied was, that the reports incorrectly represented that there was no prospect of a rival line, and also that the report of December, 1857, showed that the receipts from the traffic exceeded the expenditure, and that it was not disclosed to the plaintiff that subsequently the expenditure had almost uniformly exceeded the traffic returns.

On the 25th of August, 1858, the plaintiff transmitted to the directors, through the secretary, a proposal to purchase 200 forfeited (A) shares in the company. This proposal was laid before the directors on the following day, and accepted by them on the 27th. The secretary deposed that on laying the proposal before the directors, he informed them in general terms of the inquiries which the plaintiff had made, and of the explanations which he had given in reply. At this time there were not so many as 200 shares actually forfeited, and the company proceeded to forfeit further shares, to enable them to complete the transaction. The purchase was completed as to fifty-five shares on the 19th of September, 1858, when the plaintiff paid 563*l.* 16*s.*; as to 114 shares on the 28th of the same month, when the plaintiff paid 1168*l.* 10*s.*; and as to the remaining thirty-one shares on the 4th of October, the plaintiff paying 317*l.* 15*s.* Part of the arrangement was, that the plaintiff was to pay up the full amount of the unpaid calls on his shares, and to be made a director. The plaintiff, on the 2d of November, paid 1600*l.*; the amount on the future calls on his shares, and he was elected a director.

The plaintiff deposed distinctly and positively that he was
* 589 wholly unaware of the existence of the Act 19 Vict. * c. 69,

or of there being any doubt as to the company's having an absolute title to their land, until he learned it at a meeting of the board of directors on either the 9th or 15th of December, 1858; that at this meeting there was taken into consideration a letter from New Brunswick, showing a cost of 4500*l.* per mile instead of 2800*l.* for completing the line; that the plaintiff suggested that this pecuniary difficulty might be got over by mortgaging lands which had been granted to the company, or by forming a subsidiary land company, but was informed by one of the directors that this plan was not feasible, because the company could not dispose of the lands, as they would revert to the government if

the railway was not completed in 1860, — a statement in which the other directors then present concurred. The Court considered that there was no reason to doubt the accuracy of the above deposition.

The plaintiff, in December, 1858, commenced a correspondence with the company, insisting that he was entitled to be relieved from his purchase on the ground that he had been induced to enter into it by erroneous representations as to the class (A) shares and the state of the company's affairs, but did not put forward any case as to the non-communication of the question whether the title of the company to its land was not defeasible. His claim to have the contract rescinded not being acceded to, he, on the 9th of January, 1859, filed the present bill claiming relief on both grounds. The bill prayed that the contract for the purchase of the 200 (A) shares in the said company might be rescinded and that the purchase-money paid by the plaintiff might be repaid by the defendants, the directors, together with interest at the rate of 6l. per cent, or at such other rate as to the Court should seem fit, on his delivering up to the directors the certificates of the shares; or in case the * defendants, the company, were not entitled to retain * 590 for their own benefit the purchase-money obtained for them by the directors under a contract grounded on their misrepresentations, then that the company might be directed to repay to the plaintiff the money paid by him for the shares, with interest as aforesaid, on his delivering up the certificates of the shares. It also prayed an account of what was due for purchase-money and interest, and a prayer that if the company were liable as aforesaid a receiver might be appointed to get in the calls on the shares of the company, and for other purposes, and that the company, if so liable, might be restrained from incurring any further outlay in carrying their line beyond the Howard Settlement and from paying any further interest to the shareholders on their paid-up capital until the sum found due to the plaintiff had been paid him, and that the company might be directed to remove the name of the plaintiff from the register of shareholders, and that the defendants might pay the costs of the suit.

The cause was heard before Vice-Chancellor STUART, who on the 14th of January, 1860, made a decree dismissing the bill without costs. From this decree the plaintiff appealed.

Mr. Bacon, Mr. G. L. Russell, Mr. Bushby, and Mr. T. C. Wright, for the appellant. — The plaintiff rests his case on the ground that he was induced to take these shares by misrepresentation. The representations made to him by the secretary and by the reports induced him to believe that the company had an indefeasible title to the grants of land, and also he was misled as to the state of the affairs of the company. These misrepresentations,

whether made fraudulently or not, are such as to entitle a * 591 purchaser to have the contract * rescinded. *Rawlins v.*

Wickham, (a) Scott v. Dixon. (b) The plaintiff here was dealing with the company by means of their authorized agents; the reports adopted by the company were representations of the company; and the shares he bought were forfeited shares belonging to the company. The case, therefore, is clear of the considerations applicable to cases in which it has been held that the company was not liable for the misrepresentations made.

National Exchange Company of Glasgow v. Drew, (c) Clarke v. Dickson, (d) Brockwell's Case, (e) Barton's Case, (g) and Nicoll's Case (h) were also referred to.

Mr. Malins, Sir H. M. Cairns, and Mr. Baggallay for the company and the directors. — Assuming that misrepresentations were made by the secretary and directors, they had no authority to make them, and the company are not liable for their having done so. *Nicoll's Case. (h)* But in fact no misrepresentations were made. As regards the state of the company, the secretary gave information to the best of his belief, and stated it merely as matter of belief. With respect to the title to the land, the plaintiff had full means of information. Persons dealing with a company are presumed by law to know the contents of the instruments constituting the company. *Ernest v. Nicholls, (i) Athenæum Life Assurance Society v. Pooley. (k)* The plaintiff, therefore, in the present case, must be deemed to have known the contents of the articles of association,

(a) 3 De G. & J. 304.

(b) 29 L. J., N. S., Exch. 63.

(c) 2 Macq. 103.

(d) 27 L. J., N. S. 223.

(e) 4 Drew, 205.

(g) 4 Drew. 535.

(h) 3 De G. & J. 387.

(i) 6 H. L. Cas. 401, 418.

(k) 3 De G. & J. 294.

he was bound to look to them, and they correctly recite * the Act 19 Vict. c. 69. A complete copy of the Acts was * 592 given to him and examined by him. The plaintiff says he knew nothing about the defeasible title till he was informed of it after becoming a director ; but he did not complain of this before the bill was filed, and he could not afterwards take up a new ground for being released from his purchase. The reports of 1857 and 1858 were reports addressed to the shareholders, and must be construed as they would be construed by persons having the knowledge which the shareholders had. There is nothing in the reports calculated to mislead the shareholders. With regard to the title to the land, we contend that, notwithstanding the divesting clause in the 19 Vict. c. 69, the title, taking all the Acts together, is not defeasible.

Mr. Bacon, in reply.—The reports ought not to be looked at with reference to the knowledge possessed by the shareholders, for they were used in this case to influence the mind of a person who was not a shareholder, and therefore must be read as a stranger would construe them. They treat the title to the land as indefeasible, but before this purchase the company had been positively advised that it was defeasible. They ought not to have suppressed this opinion unless it was clearly wrong, and it is impossible to say that the title is clearly indefeasible.

Judgment reserved.

April 26.

The Lord Justice TURNER, after stating the facts of the case and reviewing the evidence, from which his Lordship deduced the results stated above, proceeded as follows :—

Having thus stated this case, perhaps with too much * detail (but these cases depend so much upon detail that I * 593 have thought it right to go very carefully through the facts of the case), the first question to be considered is, how this case would have stood if this bill had been filed on the 26th of November, 1858? In considering that question I do not propose to enter into the points which are raised by this bill, and which were argued at such great, although certainly not unnecessary, length

at the bar, as to the statements contained in the reports of December, 1857, and July, 1858, with respect to the liquidation of claims once in six weeks, with respect to the traffic and to the income derived from it having exceeded the expenditure, and with respect to there being no prospect of a rival line. I say no more on those points than that I am not satisfied upon them. I am not satisfied that the plaintiff could maintain the case upon the allegations in this bill as to the rival line, or upon the statements in the reports as to the liquidation of the claims; and still less am I satisfied that directors of companies, using the reports which have been made by them for the purpose of sales of shares by them, can justify so using those reports when the circumstances have changed, without apprising the party who is proposing to purchase from them of the change which has so taken place. I make this observation with reference to traffic, because, although it is true that the statements contained in the report, I think, of December, 1857, were correct at the time when those statements were made, it is not less true that after those statements had been made in the report of December, 1857, the monthly returns as to the traffic and the expenditure upon this railway had shown that the expenditure exceeded the traffic. I am not certainly prepared to say that the directors of companies may put into the hands of a person proposing to purchase shares from them a report made, for instance,

in December, 1857, stating the traffic to have exceeded the
 * 594 expenditure, * as it did in fact at that time, without at the same time apprising the person who proposes to purchase from them that from December, 1857, down to the time of that purchase, suppose in August, 1858, the returns had been different, and had shown that the traffic, so far from exceeding the expenditure, had fallen short of it, and that the company was incurring loss instead of gaining profit, as had been shown by the report of December, 1857.

I pass by these points, however, for the purpose of considering how this case stands as to the land and as to the timber. It cannot, I think, be denied that by the production to the plaintiff of these grants of land to the company, absolute upon the face of them, with a reservation only of mines of coal, gold, and silver, and by the production to the plaintiff of the reports of December, 1857 and 1858, the plaintiff was led to believe that the company had an absolute title to those lands. Nor can it be denied that at

the very time when this purchase-transaction took place the company had been advised by counsel that their title to the land was defeasible. Now, then, the question is, Were they justified in leading the plaintiff to believe that they had an indefeasible title to the land? And can they in this Court maintain a sale made by them to the plaintiff under such circumstances? I am of opinion that they cannot. They placed before the plaintiff the Crown grants, the best if not the only evidence of title to the land; they had been advised that that title was defeasible. They gave the plaintiff no information upon that subject. They say that he had means of informing himself; that the Acts were placed before him. But under what circumstances? Why, with the assurance at the same time that the title was absolute, evidenced by the production of the grants and of the reports. I cannot go the length of holding that under such circumstances the plaintiff was bound to examine * those * 595 Acts of Parliament with the same care and caution as he might have been bound to do if no such representation had been made. I think the representation might well put the plaintiff off his guard, and in fact, according to the statement in his affidavit, he appears to have examined the Acts cursorily, and to have proposed to come again and examine them. The secretary gave him a copy of the Acts, and he did not come again. Now the copy of the Acts which was given to him, as I have already shown, did not contain the Act of the 19 Vict. I certainly desire not to be understood as imputing any fraud in this. I do not believe that any fraud was intended in giving the plaintiff a copy of the Acts which did not contain the 19 Vict. But although no fraud was intended, I cannot but look at that circumstance as furnishing some excuse to the plaintiff for not having discovered that the title was a defeasible and not an absolute title. I think, therefore, that the plaintiff was not furnished with any such sufficient means of detecting the falsehood (and when I use the word "falsehood," I do not mean to do it in an offensive sense), that he was not furnished with any such sufficient means of detecting the falsehood of the representations which were made to him as would defeat his right to set aside the purchase. The doctrine of the Court on this subject is to be found summed up in the case of *Edwards v. M'Leay*. (a) There Lord ELDON says, with reference to an ordinary case between vendor and purchaser of land: "The case resolves itself into the

(a) 2 Swanst. 287.

question, whether the representation made to the plaintiff was not in the sense in which we use the term 'fraudulent.' I am not apprised of any such decision, but I agree with the Master of the Rolls that if one party makes a representation which he knows to be false, the falsehood of which the other party had no * 596 means of * knowing, this Court will rescind the contract."

Now I think it is not going too far to say that when it is said, "which the other party had no means of knowing," it is meant "had no sufficient means of knowing." That, I think, is the sense in which the words "means of knowing" are used in the passage to which I have referred.

But it was said for the defendants, that a purchaser of property of this description must be taken to have purchased with knowledge of the acts of the company and of the articles of association; and the case of *Ernest v. Nicholls* (a) was referred to on that subject. That case does not seem to me at all to apply to the present. That was not, as here, a question on the effect of representations which had been made to the purchaser, and the extent to which a purchaser may be bound in the absence of representations cannot decide to what extent he is to be bound if false representations have been made. I think, therefore, that the consideration of *Ernest v. Nicholls* may be laid out of the present case.

Then it was said for the defendants, that the company were not bound by the conduct of their secretary. But I hold, and until corrected by higher authority shall continue to hold, the opinion which I expressed in *Nicoll's Case*, that directors being in the position of trustees,¹ their *cestuis que trust*, the members of the company, cannot be permitted by this Court to retain moneys acquired by means of a sale made by the directors; which in the eye of this Court is fraudulent. I mean, of course, where the purchase is made from the directors, and where there has been no acquiescence or conduct of the purchaser to preclude the right to set aside the sale; for I agree most fully to the position that acquies- * 597 cence or conduct * may preclude the right; and I speak, therefore, only of the case of a sale by directors themselves in a company where there has been no such acquiescence or conduct on

(a) 6 H. L. Cas. 401.

¹ See *Shrewsbury & Birmingham Railway Co. v. The London and North Western Railway Co.*, 4 De G., M. & G. 115, note (1); *Bennett's Case*, 5 De G., M. & G. 284.

the part of the purchaser as to affect his rights ; I speak of representations made in the course of the progress of the negotiation for such sale. Now, that a company may not generally be bound by the acts of their secretary, I also agree ; but here the secretary was the agent of the directors in effecting this sale. His acts, therefore, were the acts of the directors ; and I think, therefore, that the company must be bound by them.

A most able argument was urged on the part of the defendants before us to show that upon the true construction of the several Acts of Parliament relating to the St. Andrews and Quebec Company and to this company, the title to these lands and to the timber upon them, was in fact indefeasible. This, however, is a point which may come in question with other parties, and I do not think it right, therefore, to give any opinion upon it, unless I could be satisfied it was perfectly clear that upon the construction of these Acts of Parliament the company had an absolute title. I have looked carefully into the Acts for the purpose of seeing whether I can satisfy my mind that that is a clear point, but neither my own consideration of the Acts nor the very able argument which I have heard upon them has satisfied me that that point is altogether clear. If it be not altogether clear, I think it is sufficient to say that as the question was open to doubt, the defendants, the directors of the company, were not justified in the course which they pursued in leading the plaintiff to believe that there was no doubt.¹ I think that they were bound, if there was a doubt, to have stated their doubt when they put before him the grants containing and showing an absolute title to the land. Now it is said that the

* provincial government of New Brunswick have actually * 598
recognized the right to timber, and have paid the company
for timber upon these very lands. Some correspondence between the government of New Brunswick and the manager of the company in Canada was laid before us for the purpose of proving that point. I have looked into that correspondence ; I believe it to be the only evidence on the subject. So far from showing that the government recognized the title of the company to these lands as an absolute title, the claim on the part of the company to the timber which was in question proceeded upon the footing, not that the title was absolute, but that there was no doubt that by the completion of the line the title would become absolute. It seems to me

¹ See *per* Lord CRANWORTH, 9 H. L. Cas. 737.

that that correspondence rather tends to damage than to aid the defendants' case.

Another argument which was advanced for the defendants was this, that the acquisition of the land was not the object with which the plaintiff purchased these shares, but whether the acquisition of the land was the plaintiff's immediate object or not, there can be no doubt that the land formed a material ingredient in the purchase; and we find the plaintiff referring to the land as the source by means of which the embarrassments of the company could be met.

Upon the whole, therefore, the conclusion at which I have arrived on this part of the case, as to how the transaction would have stood on the 26th of November, 1858, is this, that if the bill had been filed on that day, it would have been the duty of this Court to set aside the purchase of these shares. I should have been very glad to have come to a different conclusion. Property of this de-

* 599 description is so often made the subject of mere speculation,

that I feel, beyond description, I may say, * reluctant to interfere in a case of this nature. Dealings in purchases or

sales of shares do not stand, perhaps, exactly on the same footing as dealings in the purchase and sale of land. There is much more room for opinion as contradistinguished from fact in the one case than the other, and there is much greater danger in the one case than in the other of speculators endeavouring to convert their speculations into certainties, by holding to their purchases if they turn out to be beneficial, and if they turn out to be otherwise, repudiating them, on the ground of some alleged misrepresentation. These considerations, however, seem to me to go more to the difficulty of applying the principles of the Court to such cases than to the question whether these principles are applicable. They go, I think, no further than to show that such cases are to be watched with the utmost vigilance, and that the Court before it interferes in such cases ought to be satisfied beyond all doubt, that there has been misrepresentation, and that the purchaser has acted upon it.

The plaintiff being thus entitled to be relieved from the purchase on the 26th of November, 1858, the question is, whether he afterwards lost that right before the filing of the bill on the 14th of February, 1859? That he knew the financial difficulties of this company on the 25th of November, 1858, is clear. But he had not then in his possession any means of discovering the defect

in the title to the land. The Act of the 19 Vict. c. 69, was not in his possession. The earliest period at which this knowledge can be imputed to him seems to me to have been the 9th of December, 1858. From that time, so far as I can find, the plaintiff has always asserted his title to be relieved in respect of all the shares, modifying, indeed, the claims which he made in respect of them. In his letter of the 9th of December, 1858, he proposed to * take debentures for the 145 shares and to * 600 hold the 55 shares; but he still asserts his title to be relieved from the purchase as to all the shares. In his letter of the 28th of December, 1858, he asked for repayment of the money in respect of 145 shares, but still (as I understand that letter) asserted that he had a right to relief in respect of all the shares. Now it is quite true, as was observed in argument on the part of the defendants, that the plaintiff did not put his right to be relieved in respect of the purchase on the point as to the title to the land, but that he put forward another ground, which perhaps he considered to be sufficient. If his silence on the subject of the title to the land is to prevail against him, I think it can only be on one or other of these grounds: either as affording proof that he had known the state of the title, and therefore was not deceived by the misrepresentation, or as affording proof that he meant to abandon any claim upon the footing of that misrepresentation. As to the first of these grounds, I think it is answered by the evidence. As to the other ground, I do not think that where a party has two grounds of complaint, and in correspondence asserts one of them, it ought to be inferred that he means to abandon the other; at all events, this ground was put forward by the plaintiff as early as the 8th of January, 1859, when this bill was filed. Under these circumstances I cannot say that I think the plaintiff is precluded from relief.

The result therefore of this case, according to my opinion, is this: that there must be a decree against the company to refund the purchase-money. I think there must be interest upon the purchase-money at 4l. per cent, and the decree of course must be upon the plaintiff delivering up the shares. I think there is no sufficient case for a decree against the directors; and the plaintiff then by virtue of the decree becoming a creditor. I think * we have nothing to do with the further relief which * 601 he asks by this bill in reference to restraining the company

from applying their funds. It seems to me that the simple decree to be made is a decree against the company to refund the money with interest at 4l. per cent. The plaintiff must take his course to recover that money from the company as any other creditor would do. I think it is not a case for giving any costs at all. There has been so much carelessness on the part of the plaintiff in the transaction that it is not a case in which I am disposed to give any costs.

THE LORD JUSTICE KNIGHT BRUCE. — At the conclusion of the argument before us in this cause, which has reminded me of the *Beverley Case*, not long ago before the Master of the Rolls, the Lords Justices, and the House of Lords, my impression was against the appellant; at least, to this extent, that the merits appeared to me involved in so much obscurity and doubt that I thought him scarcely in a condition, especially as the plaintiff in the suit, to ask us to depart from an order which we were perhaps bound to assume to be right, until we should be convinced to the contrary. Further consideration of this, one of the most perplexing cases, to me at least, with which for a long time I have had to deal, has brought me to the opinion that the reasons in favour of giving him a decree preponderate over those which, plausible, to say the least, are opposed to it; and I accede to the view of the matter taken by my learned brother, to whose careful judgment, the result of so much and such close attention, I will not attempt to add.

1860. April 21. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A drawer in Louisiana of bills of exchange upon acceptors in London held entitled to prove under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for 10l. per cent upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills on their return dishonoured and protested for non-payment in Louisiana.¹

¹ See 3 Kent, 115, 116; Chitty Bills (12th Am. ed.), 684 *et seq.*; Story Bills of Exchange, § 399; 2 Greenl. Ev. § 261.

THIS was a special case, originally argued in part before the Lords Justices, and then transferred to the paper of the full Court, their Lordships deeming the question raised upon the special case of sufficient importance to warrant its being reargued before the full Court.

The case stated in substance as follows : —

In and prior to the year 1854, Messrs. Morewood & Rogers carried on business as copartners in London, and at Melbourne, in Australia. They had at the same time extensive dealings with various persons in the United States of America as purchasers of cotton, and at various times previously to and in the year 1854 sent commissions to the defendant Adolphus Hamilton, a broker and merchant residing at New Orleans, in the State of Louisiana, to purchase on their behalf large quantities of cotton to be consigned to them in England. In pursuance of these commissions, the defendant Hamilton from time to time purchased and consigned the required quantities of cotton on account of Messrs. Morewood & Rogers, and drew upon them bills of exchange for the amount of the cost of the cotton, commission, and other usual expenses incurred in purchasing and consigning it. All such bills of exchange as were drawn prior to the 4th October, 1854, were duly accepted and paid by Messrs. Morewood & Rogers. In addition to the bills so accepted and paid, Hamilton, in the months of October and November, 1854, drew at New Orleans thirty-six bills of exchange, for sums amounting in the whole to * 35,630*l.* 5*s.* 6*d.*, on Messrs. Morewood & Rogers, * 603 who were then indebted to him in a larger amount. All these bills were drawn payable to the order of Samuel C. Bell as the cashier of a joint-stock company established at New Orleans, called the New Orleans Canal and Banking Company.

One of these bills was dated the 4th October, 1854, and was in the following form : —

“ Exchange for 1000*l.* sterling, New Orleans, October 4, 1854.

“ Sixty days after sight of this first of exchange, second and third unpaid, pay to the order of Samuel C. Bell, cashier, 1000*l.* sterling, value received, and charge the same to account of Messrs. Morewood & Rogers, London.

“ ADOLPHUS HAMILTON.”

The other bills were similar in form.

All these bills were, at the times when they were respectively drawn, transferred by Hamilton to the New Orleans Canal and Banking Company, and subsequently and before acceptance, indorsed and transferred by or on behalf of the company to various persons.

All the bills were duly accepted in London by Messrs. Morewood & Rogers, at dates between the 1st and 23d November, 1854.

On the 2d January, 1855, Messrs. Morewood & Rogers stopped payment; and on the 26th January, 1855, for the purpose of carrying into effect an arrangement previously made by them with their creditors, they executed to the plaintiffs, as trustees for * 604 themselves and * the several other persons parties thereto of the third part, creditors of the said Messrs. Morewood & Rogers, the ordinary deed of assignment of all their estate and effects for distribution amongst such creditors, in satisfaction of their debts in proper order and proportion, and as such debts would be paid in case the insolvents had become bankrupts.

At various dates between the 3d and 25th of January, 1855, the thirty-six bills of exchange were respectively, as they became due and payable, presented in London for payment to Messrs. Morewood & Rogers, who, under the circumstances above stated, were unable to pay them, and the bills thereupon were respectively duly protested for non-payment.

The deed of arrangement of the 26th January, 1855, was, at various times afterwards, executed by the whole of the creditors of Messrs. Morewood & Rogers, including the defendant Hamilton.

On the 26th January, 1855, the whole of the bills protested for non-payment were paid in London, *supra* protest, for the honour of the New Orleans Canal and Banking Company, by Messrs. Overend, Gurney, & Co., of London, and by them subsequently transferred to the New Orleans Canal and Banking Company; and the company, by their duly authorized agent, afterwards executed the deed of arrangement of the 26th January, 1855, as claimants in respect of the bills thus transferred to them.

On the return of the dishonoured bills to New Orleans, the defendant Hamilton paid to the New Orleans Canal and Banking Company the amount of the bills, with the addition of 10l.

* 605 per cent damages in lieu of re-exchange * on such amount, which, as the drawer in New Orleans of the bills, he was

liable by the law of the State of Louisiana to pay in consequence of such bills having been protested for non-payment by the acceptors in England, together with interest on the respective amounts of the bills and damages from the time of protest.

The defendant Hamilton claimed to be admitted as a creditor under the deed of arrangement, not only for the amount of the dishonoured bills, but also for the 10*l.* per cent damages thereon, amounting to 3563*l.*, but not in respect of interest on the bills or any of them.

The plaintiffs, as trustees of the deed of arrangement, had admitted proof by the defendant Hamilton, and paid dividends to him in respect of the amount of the bills, such dividends having been paid and received without prejudice to the claim of Hamilton to be admitted as a creditor for the sum of 3563*l.* for damages.

The question for the opinion of the Court was, whether the defendant Adolphus Hamilton was entitled to be admitted as a creditor under the deed of arrangement in respect of the sum of 3563*l.* paid by him for damages on the return to New Orleans of the bills of exchange drawn by him on Messrs Morewood & Rogers, and accepted but dishonoured by them and protested for non-payment as above mentioned, or for any other sum for damages paid by him on the bills, or any of them.

Mr. Daniel and *Mr. Wickens*, for the plaintiffs. — The acceptor is not, upon non-payment of a bill, liable to the holder for any thing more than the principal sum and the expenses of the protest and interest thereon from the time of maturity of the bill, and not liable for *re-exchange. Story on Bills of Ex- * 606 change, (a) *Napier v. Schneider*, (b) *Woolsey v. D. Crawford*. (c) There is no obligation on the acceptor, except that created by the custom of merchants, and that custom does not give a right to an indorser or holder to recover re-exchange. *Dawson v. Morgan*. (d) The only question is, whether by the law of England the acceptor's liability to the drawer is different from what it is to the holder or indorser? It is submitted not. In *Francis v. Rucker*, (e) Lord CAMDEN allowed the drawer of a bill, which had been drawn in pursuance of orders of the acceptors, to prove his debt, including re-exchange, against the acceptors, who had become

(a) Sect. 398.

(d) 8 B. & C. 618.

(b) 12 East, 420.

(e) Amb. 672.

(c) 2 Camp. 445.

bankrupt. But in that case Lord CAMDEN is supposed to have proceeded merely on the special Act of the colony in which the bills were drawn, providing that bills which should be returned should be paid with twenty per cent beyond the amount of the original bills. *Ex parte Moore Re Tyler.* (a) By the general law there is no distinction between the rights of the drawer and the rights of the holder or indorser as against an acceptor. Cooke's Bankrupt Laws, (b) *Kent's Commentaries.* (c) And by that law the acceptor is not liable for re-exchange to the holder, though the latter may have paid it as indorser, and although it be a liquidated sum. *Woolsey v. D. Crawford.* (d) The mode of payment of the bills and the consequences of non-payment are governed by the law of the country in which the payment was contracted to be made.

Cooper v. The Earl of Waldegrave. (e) Moreover, in *Francis v. Rucker,* (g) Lord CAMDEN considered * that the twenty per cent was made by the Act of the colony a liquidated demand, and therefore distinguishable from re-exchange, the difference upon which was an uncertain damage. In the present case the 10l. per cent is made payable in lieu of, and stands on the same footing as, re-exchange, and cannot be regarded as damages, technically speaking, liquidated, any more than the re-exchange itself. On this second ground, therefore, the present case is also distinguishable from *Francis v. Rucker,* (g) and we submit, on both grounds, that the proposed proof cannot be admitted.

Mr. Bacon and Mr. W. F. Robinson, for the defendant Hamilton. — If *Francis v. Rucker* (g) be law, our right of proof for the sum claimed cannot be disputed. The engagement entered into by the acceptors of the bills was to pay the bills, or the 10l. per cent, the consequent damages according to the law of Louisiana, in the same manner as if they had expressly stipulated to do so. The sum payable for damages has relation, when it accrues, to the original transaction, and becomes part of the debt. In *Ex parte Moore, Re Tyler,* (a) Lord THURLOW admitted the authority of *Francis v. Rucker,* (g) but drew a distinction between it and the case before him on the ground that proof in bankruptcy could only be admitted for damages existing at the time when the act of

(a) 2 Bro. C. C. 597.

(d) 2 Camp. 445.

(b) Page 194.

(e) 2 Beav. 282.

(c) Vol. 3, pp. 153, 154.

(g) Amb. 672.

bankruptcy was committed; but that distinction now no longer exists. The Bankrupt Law Consolidation Act, 1849. (a) The two decisions are not inconsistent. In the other cases cited the question was between the holder and acceptor, not between the drawer and acceptor of the bills. This claim is for damages, which may fairly and reasonably * be considered * 608 as arising naturally, *i.e.* according to the usual course of things, from the breach of contract to pay the bills, or which may reasonably be supposed to have been, in the contemplation of both parties when they made the contract, the probable result of the breach of it. It is a claim, therefore, which would be recoverable at common law. *Hadley v. Baxendale*. (b) Where a bill of exchange is drawn in one country and payable in another, and is dishonoured, the drawer is liable according to the *lex loci contractus*, and not according to that of the country in which the bill is made payable. *Allen v. Kemble*. (c)

Mr. Daniel replied.

THE LORD CHANCELLOR. — *Mr. Daniel* has done all that could be done in support of the case of those who have the good fortune to have him for their advocate; but I must say that I think the merits are decidedly against him. I am clearly of opinion that *Mr. Hamilton* had a right to prove for this 10*l.* per cent under the deed. It would be a great injustice if he had not. He is employed by Messrs. Morewood & Co. to buy goods for them upon commission, to send these goods to Liverpool in the United Kingdom, and he is desired by them to draw bills upon them for the price of the goods and commission, which they undertake to accept and to pay. He does buy the goods; he does draw the bills. The bills are accepted, and, when due, are dishonoured, and then what is the situation of *Mr. Hamilton*? He is sued and obliged to pay the amount of the 10*l.* per cent in consequence of a law subsisting in Louisiana, where the bills were drawn or where the * transaction took place. He being thus out of pocket in * 609 respect of the sum that he had paid as well as in respect of his services as a commission merchant, and having actually paid the 10*l.* per cent, it is alleged, that under this deed of composition, executed between these gentlemen and their creditors, he has no

(a) Sect. 178.

(b) 9 Exch. 341.

(c) 6 Moore, 314.

remedy for the 10l. per cent which he so paid. It would be a great injustice that he should lose the sum which he has paid in obeying their commands. As the case was ingeniously put by *Mr. Robinson*, they asked him to be their surety, and he became their surety by drawing the bills, and in that character was called on to pay. But a surety has a right against his principals to be recouped what he has paid as surety at their request.

Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken: the payment of the 10l. per cent was the natural and direct consequence of that breach of contract, and, therefore, the party to whom that promise was made and who suffered from that breach of the promise is very ill used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

This reasoning, I think, applies generally to the drawer of a bill in a foreign country on an acceptor in another foreign country, where there may be a re-exchange or some law giving a fixed sum in payment of exchange; because what is paid under that law in lieu of re-exchange is a necessary consequence of the breach

*610 of contract on the part of the acceptor of the bill, and *I have no doubt that in an action at law in an English Court it might be recovered, on setting out the acceptance, the dishonour, and *per quod* that the plaintiff was compelled to pay the 10l. per cent to the holder of the bill.

That seems to me to be the correct principle, and we have the authority of Pothier (*a*) for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon. (*b*) We have the authority of Story, the great jurist, (*c*) who gives countenance to that doctrine; and we have that which *Mr. Daniel* was unable to cope with, viz., the express authority of an English Court of justice in the case of *Francis v. Rucker*, (*d*)

(a) Pothier, *Contrat d'Exchange*, par Dupin, pl. 117.

(b) Code de Commerce, liv. 1, tit. 8, § 13.

(c) Story on Bills of Exchange, § 398.

(d) Amb. 672.

which is expressly in point with the present. It was a case that was well considered by Lord CAMDEN, who so felt the great importance of it, that, in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed, so that his opinion might be reviewed and the opinion of the House of Lords, if necessary, taken upon it. (a) His *decision, however, was not *611 appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense.

If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but notwithstanding all the diligence which has been exercised by *Mr. Daniel* and his learned junior, they have brought no single authority that directly conflicts with that case, because in *Ex parte Moore* (b) the proof was allowed. Some observations were made by Lord THURLOW respecting *Francis v. Rucker*, (c) but he acquiesced in it, and the proof was allowed. In *Napier v. Schneider*, (d) a gentleman at the bar asked for a reference to the Master as to the amount that was due on a bill of exchange and for re-exchange (not 10*l.* or 20*l.* per cent or any given percentage), and

(a) The petition in bankruptcy was presented by the plaintiff in the suit, Tench Francis, and after stating the facts appearing in the report of *Francis v. Rucker* (Amb. 672), and that a dividend had been advertised, it prayed that the commissioners might be ordered to admit the petitioner to prove for the whole of his debt under the commission, viz., the sum for which the bills were drawn, with the twenty per cent thereon, and to receive a dividend in respect thereof; that in the mean time the assignees might be restrained from making a dividend, or ordered to retain in their hands sufficient to answer the petitioner's dividend, and that the bankrupts' certificate might be stayed until the petitioner should have been admitted a creditor under the commission.

The following was the order made upon the petition: —

“ August 4th, 1761.

“ Re Hagen and Wolpman. — I do order that the said petition be and the same is hereby dismissed, but such dismissal of the said petition is to be without prejudice to the petitioner's bringing his bill, which he is to file forthwith, to ascertain his demand in respect of damages mentioned in the said petition. And I do order that in the mean time the petitioner be at liberty to enter a claim for the said damages before the commissioners acting under the said commission, and that the allowance and confirmation of the said bankrupts' certificate be stayed until further order. — CAMDEN, C.” — Reg. Lib. vol. 45, p. 196.

(b) 2 Bro. C. C. 597.

(c) Amb. 672.

(d) 12 East, 420.

the Court held that the Master was not competent to enter into all this calculation. But if it had been a fixed sum of 10*l.* per cent, the Master would have had no difficulty, and I am inclined to believe that in such a case the counsel who made the application would have succeeded, instead of failing. The case of *Woolsey v. D. Crawford* (a) is at most a *Nisi Prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained;

* 612 * and as to this *Nisi Prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*. (b) But the case before us is distinguishable from it because it is only there said that a claim in respect of re-exchange could not be admitted, and here we are not upon re-exchange, but upon a liquidated sum of 10*l.* per cent. I do not, therefore, find any authority at all to conflict with the case of *Francis v. Rucker*, (b) and upon that I think we may safely decide in favour of this demand.

THE LORD JUSTICE KNIGHT BRUCE.—I also think that the first and main branch of the question must be answered in the affirmative.

THE LORD JUSTICE TURNER. — I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but, as between the drawer and the acceptors, in my opinion, there is a liability in the acceptors which would have been provable under a bankruptcy. Therefore the case of *Francis v. Rucker* (b) is distinct upon the point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect of the cases at law may be, as between the holder and the acceptor, they do not, in my judgment, affect the case as between the drawer and the acceptor; and in my opinion, therefore, our answer must be in the affirmative.

(a) 2 Camp. 445.

(b) Amb. 672.

THE EARL OF TYRONE *v.* THE MARQUIS OF WATERFORD.

1860. March 10, 17, 24. April 28. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Under a testamentary gift "to my brother B. and to his children in succession:" *Held*, upon the construction of the whole will, that B. took an estate tail in the freeholds¹ and an absolute interest in the leaseholds and general personal estate.²

Debts due to the testator in respect of collieries belonging to him in the county of N. held to pass under a devise of all land and property belonging to him in the county of N.

THIS was a special case transferred from the paper of the Master of the Rolls, and heard originally by the full Court of appeal.

The question submitted for the opinion of the Court arose upon the construction of the will, dated the 17th August, 1852, of the late Marquis of Waterford, which was in the following terms:—

"I, Henry Marquis of Waterford, make the following will: I leave Ford Castle and all land and property belonging to me in the county of Northumberland to my wife Louisa Ann, Marchioness of Waterford, for her life; and I desire that her jointure shall be paid out of my said property in the county of Northumberland. I desire that my debts, or interest upon them, shall be paid from the income of my Irish property. I leave to my sister Sarah, Countess Talbot, 1000*l.* a year for her life, to be paid out of the income of my Irish property. If my wife have a child by me, I leave to the said child all my property of every kind, except my wife's life-interest in my property in the county of Northumberland, and except the Countess Talbot's life-interest of 1000*l.* a year in my Irish property. In case my wife has no children by me, I leave my Irish property, subject to all charges upon it, to my brother Lord John Beresford and to his children in succession; and in case my wife have no children by me, at her death I leave all my English property to my brother Lord John Beresford and his children in succession. I leave to my wife all my plate,* jewels, * 614

¹ See *Lucas v. Goldsmid*, 29 Beav. 661; *Re Pollard*, 2 N. R. 404; 2 Jarman Wills (8d Eng. ed.), 377, 432, 433.

² See *Audsley v. Horn*, *ante*, 236; 2 Kent, 353, 354; 2 Jarman Wills (4th Am. ed.), 350, note (1); *Stokes v. Heron*, 12 Cl. & Fin. 190.

and money which may stand to my credit at Messrs. Coutts', on the day of my death."

The testator died on the 29th March, 1859, without having had any issue, and his only brother Lord John Beresford succeeded to the title, and took out letters of administration of the personal estate of the testator, with the will annexed, the Dowager Marchioness of Waterford having renounced administration.

At the date of his will and of his death the testator was seised in fee-simple of freehold estates in the counties of Waterford, Londonderry, Kilkenny, and Tipperary; and of other freehold estates in the county of Northumberland, known by the name of the Ford Castle Estates. He was also possessed of leasehold estates held for terms of years situate both in England and in Ireland, and intermingled with his freehold estates in those countries.

The relative values of his freehold and leasehold estates were as follows: The annual rental of the Irish freeholds was about 30,000*l.*, that of the Irish leaseholds 46*l.* 3*s.* 1*d.*, that of the English freeholds about 11,360*l.*, that of the English leaseholds 281*l.* 13*s.* 1*d.*

He kept up a suitably furnished mansion-house and residence at Curraghmore, in the county of Waterford, and another at Ford Castle, in Northumberland. Both the Irish and the English estates were subject to large encumbrances. At the time of his death his personal estate (exclusive of leaseholds for years, and of his plate and jewels, and of his balance with Messrs. Coutts) consisted of arrears of rent of the testator's estates in England and Ireland, of live stock, house furniture, and effects, colliery materials, colliery debts due to the estate, cash in England and Ireland, balances at the testator's bankers in England and Ireland, and a reversionary share of a fund in the Court of Chancery in England in a suit of *Beresford v. Armagh*.

The only persons entitled under the Statutes of Distribution to the personal estate of the late Marquis of Waterford were his brother, the present marquis, his widow, the dowager marchioness, and his sister, the Countess of Shrewsbury (in the will called, and at the date thereof being, the Countess Talbot). The Earl and Countess of Shrewsbury had disclaimed all interest in the testator's personal estate; and the present marquis and the dowager marchioness had made certain arrangements with one another on the

assumption that the residuary personal estate was not disposed of by the will.

The plaintiff was the Earl of Tyrone, the eldest son of the present Marquis of Waterford, an infant, by his special guardian Admiral Eden. The defendants were, the present Marquis of Waterford, the Dowager Marchioness of Waterford, the widow of the testator, and the three other of the four sons and only children of the present Marquis of Waterford, by their guardian the Honourable E. Kenyon. The questions for the opinion of the Court were:—

1. To what interests have the present Marquis of Waterford and his children become entitled in the freehold estates and chattels real of the late marquis by virtue of the said gift, “to my brother Lord John Beresford and to his children in succession?”

2. Whether any and what portions of the personal estate of the late marquis (other than his chattels real, his plate, his jewels, and his balance with Messrs. Coutts) passed by his will, and to whom and for what interests?

* *Mr. Roundell Palmer* and *Mr. H. T. Erskine*, for the * 616 plaintiff. — Upon the true construction of the will, the real estate is given to the present Marquis of Waterford for life, with remainder to his sons in tail general successively, in strict settlement; and the chattels real and general personal estate to the present marquis for life and then to his sons successively in tail, so that upon the death of the tenant for life, they would vest absolutely in the plaintiff. The word “children” is not used in the sentence “to my brother Lord John Beresford and his children in succession” as a word of limitation, but as a word of purchase. In the earlier part of the will, where the testator says, “in case my wife have no children by me,” the word “children” is used in the ordinary sense of that word, nor is there any context in this will which requires a different construction to be put upon it in the subsequent clause; and in *Ridgeway v. Munkittrick*, (a) Lord ST. LEONARDS said: “It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word when it occurs twice or oftener in the same instrument, unless there appear a

(a) 1 Dru. & W. 84, 93.

clear intention to the contrary." The word "children" does not easily admit of a wider sense. *Pride v. Fooks.* (a) There are few instances in which it has been used as a word of limitation. The four sons of the present marquis having been all living at the date of the will, *Wild's Case* (b) has no application. The children moreover, cannot take concurrently, either as between themselves or as between them and their father. The words "in succession" render such an interpretation impossible. *Crone v. Odell.* (c)

If then the word "children" does not mean "issue," and
 * 617 * they and their father cannot take concurrently, the father, it is submitted, can only take an estate for life. *Crawford v. Trotter*, (d) *Audsley v. Horn*, (e) *Buffar v. Bradford*. (g) He cannot take an estate tail; for then, if he should not have barred the entail, there would upon his death be two estates tail in his eldest son, one by descent and the other by purchase. The words "in succession" follow the word "children" in the will, and are applicable, therefore, as between them *inter se* as well as between them and their father. *Ongley v. Peale*, (h) *Viner's Abr.* (i) *Lawe v. Davies*, (k) *Webb v. Bing*, (l) *Young v. Shepherd*. (m) Then what interests are the children to take successively as between themselves — estates for life or estates tail? The word "property" used in the will carries the inheritance of the real estate, and as to the real estates, whether in England or Ireland, it is submitted that the legal estate is in the father, and that estates tail are given after the death of the father to the children successively, with an ultimate limitation to the father in fee. *Oddie v. Woodford*. (n) As to the leaseholds, the gift being not by way of executory trust, they will vest absolutely in the plaintiff on his taking the first estate of inheritance in the reality. *Rowland v. Morgan*. (o) Lastly, it is submitted that the general personal estate all passed by the will. It is said that because the property given by the will is described under the heads English property and Irish property, the gift was not meant to include the general personal estate; but

(a) 3 De G. & J. 252.

(b) 6 Rep. 17.

(c) 1 Bal. & B. 446; 3 Dow, 61.

(d) 4 Mad. 861.

(e) 26 Beav. 195; 1 De G., F. & J. 226.

(g) 2 Atk. 220.

(h) 2 Ld. Raym. 1312.

(i) Vol. 8, tit. Devise (D), 19, 50.

(k) 2 Ld. Raym. 1561.

(l) 2 K. & J. 669.

(m) 10 Beav. 207.

(n) 3 Myl. & Cr. 584.

(o) 2 Phil. 764.

we submit that the personal estate may be considered as having a locality, so as to be included under those heads; and that such * portion as would vest in an executor under an Eng- * 618
lish probate passes under the description English property,
and such portion as vests in him under an Irish probate passes as
Irish property, and that this applies also as to the arrears of rent
due in the two countries.

Mr. Lloyd and Mr. H. R. Farrer, for the three younger children of the present marquis. — The words “in succession,” there being nothing to show in what order the devisees are to take, make the devise void for uncertainty. *Windsmore v. Hubbard*. (a) The common law is not a guide here to the exposition of the words “in succession,” as between the children, *i.e.* that the property is to go to them in succession according to seniority, as in a fee, for the word property does not necessarily carry the fee. But rather than to construe the gift so as to render the devise void, the Court will reject the words “in succession.” *Jesson v. Wright*, (b) *Roddy v. Fitzgerald*. (c) Rejecting those words, the gift would be to the father and children as joint-tenants in fee, *Mason v. Clarke*, (d) the word property passing every thing belonging to the testator at his death. *Arnold v. Arnold*. (e) If, however, the words “in succession” are to be retained, then they apply only as between the father and the children, children being *nomen collectivum*: *King v. Melling*, (g) *Phipps v. Lord Mulgrave*, (h) *Doe d. Burren v. Charlton*, (i) *Charlton v. Craven*; (k) so that the marquis will take an estate for life, with a vested remainder in all the children as joint-tenants absolutely. If the words “in succession” are retained and applied as between the * children *inter se*, as * 619
well as between the father and the children, the effect will be to give the father and the children successive life-interests one after another, according to seniority, the inheritance remaining undisposed of. *Greenwood v. Tyber*. (l)

(a) Cro. Eliz. 58.

(b) 2 Bligh, 1.

(c) 6 H. L. Cas. 823.

(d) 17 Beav. 126.

(k) Cited in *Mellish v. Mellish*, 2 B. & C. 520.

(l) Cro. Jac. 56.

(e) 2 Myl. & K. 365.

(g) 1 Vent. 231.

(h) 5 T. R. 320.

(i) 1 Man. & Gr. 429.

Mr. Selwyn and Mr. Vaughan Hawkins, for the Dowager Marchioness of Waterford. — The generality of the expression “property” is here controlled by the context. The word is used frequently in the course of the will; and in some places in a sense applicable to the real and leasehold property only, or to property from which income can be derived. For instance, in the earlier part of the will, the jointure could not be intended to be charged on the furniture of the Northumberland property, nor the debts or interest on them to be paid out of income to be derived from the furniture at Tullamore, or the live-stock, including stud of horses, on the Irish property. The scheme of the will shows that succession in some form was intended, and succession of enjoyment is inapplicable to the general personal estate; therefore intestacy, total or partial, must have been contemplated as to the general personal estate. It is submitted that, except as to the articles specifically bequeathed, there is a total intestacy as to the personality.

The Attorney-General and Mr. Hobhouse, for the marquis. — The words “in succession” must be taken to apply to the father and the children collectively. If those words were not in the will, the father and the children would take in fee-simple as joint-tenants: *Wild’s Case (a)*; but the introduction of the words * 620 “in succession” show an * intention that they should not take collectively, but one after another. If it were possible that estates in fee-simple could be taken in succession, each would take a fee-simple one after the other; but, that being impossible according to law, each takes successively the largest estate which the law allows of being so taken, viz., an estate tail. The objection that in that case the eldest son, if the marquis did not bar the entail, would, on the death of the marquis, take two estates tail, is purely technical, for one estate would merge in the other.

[THE LORD JUSTICE TURNER. — Has the Wills Act. 1 Vict. c. 26, § 28, any bearing upon the question?]

Under the word “property” the fee would pass under the Act, unless a contrary intention appears on the will, but the Act does not say what is to happen if such an intention does appear.

(a) 6 Rep. 17 a.

Taking then the words "in succession" in their ordinary sense, the father and children would take one after the other, according to seniority, an estate tail by purchase; and this construction is fortified by the absence from the will of any limitation over. The same words occurring in the same instrument with reference to different subjects, need not necessarily receive the same construction: *In re Mores' Trust*; (a) but whether the children are to take under the will in succession by purchase, or by limitation, the effect in either case is that the marquis takes an estate tail in possession. *Robinson v. Robinson*, (b) *Mellish v. Mellish*, (c) *Mandeville's Case*, (d) *Doe d. Phipps v. Lord Mulgrave*, (e) *Webb v. Byng*. (g) As to the personal estate in England, there is intestacy during the life of the dowager marchioness in the whole, except the personalty * on the Northumberland * 621 estate, and the articles specifically bequeathed to her.

Mr. Roundell Palmer, in reply. — To construe "children" as a word of limitation there must be a stronger context than is to be found in this will. *Mandeville's Case* (d) went upon the words "heirs of the body." *Robinson v. Robinson* (h) turned on the word "perpetuity" in the gift of the presentations to the first devisee of the land; and, in the other cases cited, the decision turned also on the cogency of the context of the particular will. So also in the cases where child or children has been held *nomen collectivum*. *Doe d. Garrod v. Garrod*, (i) *Doe d. Jones v. Davies*. (k) And in *Heron v. Stokes*, (l) Lord ST. LEONARDS, commenting on *Wild's Case*, (m) is represented as saying: "Certainly the more natural construction of a gift to one and his children, there being no children *in esse* at the time, and that which I should have adopted in the absence of authority the other way, would be to hold it a gift to the parent for life with remainder to the children. What is there to prevent the children taking in this manner?" Neither the use of the words "in succession,"

(a) 10 Hare, 171.

(b) Burr. 38; 2 Ves. 225; 1 Ken. 298; S. C. *nom.* *Robinson v. Hicks*, 3 B. P. C. Toml. 180.

(c) 3 B. & C. 520; 3 D. & Ry. 804.

(i) 2 B. & Ad. 87.

(d) Co. Litt. 26 b.

(k) 4 B. & Ad. 43.

(e) 5 T. R. 323.

(l) 2 Dr. & War. 89, 107.

(g) 2 K. & J. 669.

(m) 6 Rep. 17.

(h) 1 Burr. 38.

nor that of the word "property," necessarily shows that the objects of the gift are to take the same quantity of interest in succession, *i.e.* that each is to take in succession exactly the quantity of interest which the one preceding him took — but is quite consistent with a difference in the nature of the estates taken by them. The true construction of the gift is, that the objects are to take in succession according to the ordinary limitations in a strict family settlement, *i.e.* that the children

* 622 should take successively * in tail according to seniority, and that the father should take a life-interest. *Ginger v.*

White. (a) Then as to the personal estate, the word property is sufficiently comprehensive to carry the whole, just as a residuary gift would, except that there is a restriction as to locality to England and Ireland. Property, though described in the will as producing income, will include the furniture, live stock, stud, &c., for these, according to the ordinary practice in administering estates given in succession, may be converted into money and the proceeds invested. So also the personal property in England, not specifically bequeathed, must be accumulated during the life of the dowager marchioness, and the accumulations will pass after her death under the term "property." *Cunningham v. Murray.* (b)

Judgment reserved.

April 28.

THE LORD CHANCELLOR. — In making this extraordinary will, the noble testator, while labouring to be brief, is rather obscure; but, after attentively considering it, I have come to a conclusion on the several questions arising upon its construction quite satisfactory to my own mind.

As far as the freehold estates are concerned, I think the only question deserving serious attention is, whether the present Marquis of Waterford takes an estate for life or an estate tail? The claims and the arguments founded on the proposed rejection from the will of the words "in succession" always appeared to me to be wholly untenable. Such words have been rejected from a limitation, even in a deed; but that was on the supposed

(a) Willes, 348.

(b) 1 De G. & Sm. 366; and 12 Jur. 547, on appeal.

* uncertainty respecting the order in which the objects were * 623 to take. Here there can be no doubt upon this point; for, according to repeated decisions, the father taking first, the sons would take according to their priority of age. The words proposed to be struck out in the present will are most essential to the meaning of the testator, and there can be no difficulty in giving effect to them.

Had this been an executory trust, directing the estates to be settled "on Lord John Beresford and his children in succession," I should have thought there was strong reason for contending that — in the language of BULLER, J., in *Doe v. Lord Mulgrave* (a) — "it is an epitome of a strict settlement." But, considering that this is a limitation in a will, to operate directly, I think we are not at liberty to put such an interpretation upon it. We must look to the language actually employed by the testator, and consider what intention he thereby expresses, and how far, and in what manner, by the rules of law, this intention can be effectuated. Now I have very little doubt that the testator when he wrote "in case my wife has no children by me, I leave my Irish property to my brother Lord John Beresford and to his children in succession," he meant that his brother Lord John Beresford should hold the Irish estates as he himself had held them, and that each son of Lord John should successively take a similar interest in the estates. He does not use words technically, but according to their usual meaning in the English language.

The great lexicographer Dr. Johnson says, "succession" means a "series of persons following one another; a lineage; an order of descendants." Each individual in * the series is * 624 supposed to be in the same character and to enjoy the same things. To illustrate this, I may quote Sir WILLIAM BLACKSTONE, not as a law authority, but as a classical writer and a master of genuine Anglicism. In his Commentaries, after mentioning the marriage of Henry VII. with the daughter of Edward IV., he says, "Henry VIII., the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order."

The crown going to Henry VIII. and his children in succession, he having held it in full sovereignty, it went in succession to Edward VI., to Queen Mary, and to Queen Elizabeth.

(a) 5 T. R. 320, 324.

The law would not permit Lord John Beresford and his four sons each to take a fee-simple in succession; but to carry his intention into effect, Lord John himself may take an estate tail; and, in my opinion, this is the true construction of the will.

I do not think that this is at variance with any decided case or rule at law. If we are here to regard the force to be given to words in a will, considering whether they are used as words of limitation or words of purchase (a distinction and a phraseology probably wholly unknown to the testator), Lord KENYON says in *Doe v. Lord Mulgrave*, (a) "The words 'first and every other son,' 'children,' or 'heir,' may be taken as words of limitation where it is necessary to give them that construction in order to effectuate the intention of the deviser; though, ordinarily speaking, they are words of purchase."

* 625 Practically, and with a view to the interests of this * noble family, it is quite immaterial whether the sons of Lord John are considered to take successively remainders in tail. If they do, this would be no objection to an estate tail vesting in Lord John.

Looking to other parts of the will, no expression is to be found intimating an intention that Lord John should take only an estate for life; and the testator shows that he knew how an estate for life was to be created by express words.

Upon the whole, my opinion is that Lord John takes as tenant in tail the freehold estates in Ireland, and, subject to the dowager marchioness's life-interest, the freehold estates in England.

As a necessary consequence, he takes absolutely the leasehold estates in Ireland, and, subject to the dowager marchioness's life-interest, the leasehold estates in England.

With respect to the personalty, I think there is no intestacy except, during the life of the dowager marchioness, as to personalty in England not specifically bequeathed. The word "property" used in this will appears to me to have its most extensive signification. Personal property may have a locality, as we well know from the many cases in the books respecting *bona notabilia*; and in the late case of *Horsfield v. Ashton*, (b) the House of Lords

(a) 5 T. R. 320, 323.

(b) 2 Jur. N. S. 193; S. C. on app., *nom. Ashton v. Horsfield*, 6 Jur. N. S. 355.

gave full effect to the doctrine of the locality of personalty, where the subject of the gift is intelligibly described.

Of course the dowager marchioness takes for her life, * along with Ford Castle and the land in Northumberland, * 626 the personalty in Northumberland; and she takes absolutely all the plate, jewels, and money specifically bequeathed to her.

I may conclude by expressing my satisfaction that, although the testator ran the great risk of making his own will, and (as we are given to understand) refused the repeated solicitations of his friends to call in professional assistance, we are enabled, consistently with the rules of law, to put a construction upon it which may probably be according to his real intentions.

THE LORD JUSTICE KNIGHT BRUCE. — According to what appears to me the true construction of the will before us in this case, the holograph composition of a peer of large possessions, the word “property,” as used by the testator, means “real and personal property,” and ought to be so treated.¹ I think also that the will ought to be read and interpreted as giving nothing to any present or future son or daughter of the present Lord Waterford, but as giving to the present Lord Waterford an estate tail in the real property devised and the absolute interest in the personalty bequeathed, but subject of course to the gifts made by the will to the testator’s widow and sister respectively.

It is true that the will contains the word “income,” but that word, as I consider, is not sufficient to confine and does not confine the meaning of the expression “property” to realty, or to realty and chattel leaseholds. It is true also, that the present Lord Waterford’s four sons (parties in this matter) were born before the date of the will, and that it does not contain the word “issue” or the word “descendants,” or any expression relating to * posterity, which, according to common usage, * 627 is equally extensive; but it does not direct a settlement to be made, nor points to any instrument to be thereafter executed, and it twice contains the expression “in succession.” That expression, by which, as I apprehend, the testator refers exclusively or otherwise to succession between or among the offspring or some of the offspring of his brother, precludes, I think, the pos-

¹ See 1 Jarman Wills (3d Eng. ed.), 686.

sibility of saying that the sons of the present Marquis of Waterford were meant, either by way of remainder or otherwise, to take a fee-simple in the real property or in any part of it; nor does the language of the will, in my opinion, authorize us to hold that any one of the four sons is made by it a tenant in tail, whether in possession or in remainder.

But why, it may be asked, should they not be deemed tenants for life in possession or remainder? The answer, as I conceive, is, that the proposition is not so clearly, distinctly, or positively supported by the letter as to render necessary so violent a contradiction to the spirit of the instrument. The word "children" is a flexible expression, and according to a correct use of the English language has more meanings than one. Authoritative writers, as well as the habits of educated society, show that an accurate speaker may, without impropriety, use the term "children" for the purpose of indicating offspring, or descendants, or posterity, in whatsoever degree.¹ If, therefore, in this will, we read the word "children" as equivalent to "issue," or "descendants," we read it in one of the senses belonging to it, though not in that which is the most usual; nor are the instances few in which our Courts of justice construing testamentary dispositions have so interpreted it. I agree that the word "children," when used in a will for the purpose of indicating relationship and not age, must generally or universally, in the absence of an explanatory

* 628 context or * extraneous evidence showing facts rendering it impossible, or, at least, very highly improbable, that it could have been used as what lawyers call a word of "purchase," or as indicating offspring only in the first degree, be construed to be a word of purchase, and to mean only offspring in the first degree. Here, I think, we have an explanatory context. And, taking the whole language of the present will together, I am of opinion that the testator must be deemed to have used the phrase "his children in succession" as a phrase of limitation, and that the result is what I have stated.

Of course I have not failed to observe the word "children" which the testator has used twice, or the phrase "has no children by me" which he has also used twice. Whatever in any imaginable event that has not happened might have been the force or effect of any of these expressions, by none of them, I think, is the

¹ See *Prowitt v. Rodman*, 37 N. Y. 42.

interpretation of the will affected with reference to any person who has come or can come into existence.

It appears to me that the debts, whether for rent or otherwise, which at the testator's decease were due to him from persons then resident in Northumberland, were property then in Northumberland within the meaning of the will; and that the debts, whether for rent or otherwise, which were then due to him from persons then resident in Ireland, were property then in Ireland within the meaning of the will.

With regard to so much of the testator's real and personal property as at the time of his decease was in England, I think that during, but only during, his widow's life there is intestacy concerning it; except that the lady takes a life-interest in the Northumberland property, and takes, of course absolutely, the plate and jewels and * balance at a banking house given to her at * 629 the end of the will; the last clause in which must, I think, be taken as if the word "but" or "however" had stood at the head of it.

THE LORD JUSTICE TURNER. — I am also of opinion that, according to the true construction of this will, the defendant, the Marquis of Waterford, takes an estate tail in the freeholds and an absolute interest in the leaseholds both in England and in Ireland, subject of course as to the estates in Northumberland to the life-interest of the dowager marchioness, and as to the estates in Ireland to the annuity of 1000*l.* a year to Lady Shrewsbury.

I do not think it necessary, in order to arrive at this conclusion, to determine whether the word "children," as used in this will, is to be considered as a word of limitation or a word of purchase, and I do not mean, therefore, to give any opinion upon that point. Assuming (which is the view most unfavourable to the defendant the marquis's taking an estate tail) that the word "children" is to be considered as a word of purchase, I think we are driven to the same conclusion as results from its being considered as a word of limitation. The will is in these terms: [His Lordship read the will.] Now, assuming the word "children" to be a word of purchase and not of limitation, I see no ground for the argument, that the marquis and his children take different estates. They all take under the same devise, and they are to take in succession, and the words of the devise must, I think, have the same application and

effect as to each of them. Again, I think that under this devise the marquis and his children cannot take life-estates only ;
 * 630 for both the fee in the freeholds and the * whole interest in the leaseholds is included in the devise, the word " property " passing the fee and the statute also operating to pass it , (a) there being no intention to the contrary appearing by the will. Besides, the context of the will in the dispositions in favour of the dowager marchioness and of Lady Shrewsbury shows, that where the testator intended to create a life-interest only, he knew how to accomplish that end.

It follows, then, that under this devise the marquis and his children must have been intended to take estates in fee or estates tail in succession. The marquis, I think, it is perfectly clear was intended to be the first taker. If the persons to take in succession after him had been strangers, it might perhaps have been considered, that, although the law would not allow such a succession, the testator might have intended the successors to take upon failure of heirs general of the marquis, and so the marquis might have taken the fee, the dispositions in favour of the successors being void ; but the persons to take after the marquis being his children, it is plain that the testator could not have contemplated the failure of heirs general of the marquis as the event in which the successors were to take, and this being the case, the marquis could only have been intended to take an estate tail.

This distinction is well pointed out in *Crumble v. Jones*, (b) and is referred to in *Ginger v. White*. (c) It may be said that, in those cases and others of the same class, the question depends upon the meaning to be attached to the word " heirs," whether it was to be interpreted heirs general or heirs of the body ; but it
 * 631 can, * as it seems to me, make no difference in principle whether the question depended upon the meaning to be attached to a particular word or to an entire disposition. In each case the intention of the testator must be the governing rule, and the principle of those cases, therefore, seems to me to apply to the present.

It was said that it could not be intended that the marquis should take an estate tail, for that there would then, upon his death, be

(a) See 7 Will. 4 & 1 Vict. c. 26, § 28.

(b) Willea, 167.

(c) Willea, 348.

two estates tail in the eldest son, one by descent, the other by purchase ; but I see no absurdity in supposing that the testator intended to give the sons estates tail in remainder during the life of the father, when they would otherwise have had only estates in expectancy.

Other arguments were advanced, both on the part of the plaintiff and of the younger children, against the view which I have taken upon the construction of this will ; but I think they all depended more or less upon one or other of the points to which I have adverted, and it is not necessary, therefore, further to refer to them.

Upon the whole, I am fully satisfied that, on the true construction of the will, the marquis takes an estate tail in the freeholds, and, consequently, an absolute interest in the leaseholds, both in England and Ireland.

Then, as to the general personal estate, I am of opinion that it was meant to pass and passes under the word "property." That word has an extensive signification. It must have its full effect, unless controlled by the context, and I think there is no sufficient context to control it. The material difficulty has appeared to me to be the description of the property with reference to its locality ; but the Court has had to deal with this * difficulty * 632 in many cases of dispositions of personal estate, — (see the cases collected in Roper's Legacies, (a) — and has surmounted it. I think, therefore, the marquis takes the personal estate in Ireland absolutely and immediately, and that he takes the personal estate in England absolutely after the death of the dowager marchioness ; but as to the personal estate in the county of Northumberland, the dowager marchioness takes it for her life, and as to the rest of the personal estate in England, there is an intestacy during her life.

Upon looking at the enumeration of the personal estate contained in the case, the only point of difficulty which has occurred to my mind has been as to the colliery debts, whether they ought to be considered as property in the county of Northumberland ; but being connected with the colliery, which I understand to be locally situate there, I think they must be so considered.

The declarations of the case, therefore, must be as we have pointed out.

(a) Vol. 1, p. 250 (edit. 1847).

1860. April 16, 17, 25. May 2. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Bill for specific performance dismissed, although an issue had been tried and had resulted in a verdict for the plaintiff, the Court being of opinion that the agreement was one of which specific performance could not be decreed, and that the issue ought not to have been directed.¹

Semble, by L. J. TURNER, that the Court ought not, before the hearing, to direct an issue to be tried by a jury in this Court under the Statute 21 & 22 Vict. c. 27, unless by consent of counsel on both sides.²

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1147 and note (10), 1148; 2 Dart V. & P. (4th Eng. ed.) 1010.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1078; *Bradley v. Bevington*, 4 Drew. 511, 5 Jur. N. S. 562; *Davenport v. Goldberg*, 2 H. & M. 282; *Hamp v. Hamp*, 35 Beav. 189; *Jenkins v. Bushby*, 16 W. R. 189, V. C. M.; *Henderson v. Runcorn Soap and Alkali Co.*, W. N. (1868) 250, V. C. G.; *Roskell v. Whitworth*, L. R. 5 Ch. Ap. 459, L. J. G.; 2 Dart V. & P. (4th Eng. ed.) 1010. For cases where, under former practice, an issue was directed on an interlocutory application, see *Bacon v. Jones*, 4 My. & Cr. 433; 3 Jur. 994; *Ansdell v. Ansdell*, 4 My. & Cr. 449; *Townley v. Deane*, 3 Beav. 213; *Middleton v. Sherburne*, 4 Y. & C. Ex. 358, 377, 393; *Lewis v. Thomas*, 3 Hare, 26, 29; *Bonser v. Bradshaw*, 4 Jur. N. S. 1011; 6 W. R. 427, V. C. S.; *Eames v. Eames*, 16 Pick. 141; *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452; *Waterman v. Dutton*, 5 Wis. 413. At what stage of the proceedings application must be made for a trial by jury, in order to entitle a party to an issue, was left undecided in *Marston v. Brackett*, 9 N. H. 349. But in *Hoitt v. Burleigh*, 18 N. H. 389, it was determined that if a party exercises his constitutional right to require a trial by jury, it should be after the replication and before the taking of the testimony. But the Court, for sufficient reasons, may, upon its own motion, cause issues to be framed after the testimony is taken. In case a supplemental bill is filed, a motion for issues is in order after the coming in of the answer to the supplemental bill. 18 N. H. 390. A motion for an issue is premature, if made before the pleadings are closed. The Court should see what facts are controverted, and the plaintiff should have the benefit of the discovery the defendant may make in his answer. *Tibbetts v. Perkins*, 20 N. H. 275. The right to issues is not to be asserted by plea, as that might interfere with the plaintiff's right to require an answer, which is also a legal right. *Hoitt v. Burleigh*, 18 N. H. 390; see *Johnson v. Hainesworth*, 6 Ala. 443; *Eames v. Eames*, 16 Pick. 141; *Waterman v. Dutton*, 5 Wis. 413. In Tennessee, issues of fact may be framed by agreement of parties, or by the Court on application of either party, before the cause is opened or heard at all. *Lancaster v. Ward*, 1 Overton, 430. In *Charles River Bridge v. Warren Bridge*, 7 Pick. 369, 370, PARKER, C. J., said: "But it is objected that according to the course of proceedings this motion is premature, because an issue can be directed only on a

THIS was an appeal from the refusal of the Master of the Rolls of a motion by the defendant for a new trial of an issue tried in the cause, under the following circumstances : —

hearing, for it cannot be determined of what facts the issues shall consist, until after a hearing shall have taken place, and the evidence is looked at, which is adduced in support of the facts. If it were true that issues to the country should be ordered only when the Court, on inspecting the evidence, found a difficulty in deciding the fact, this position would be maintained; but certainly a full hearing is not necessary in order to come to the result; for if by inspecting the bill and answer it should be perceived that there are important facts asserted and denied, we do not see why issues may not be directed as soon as the Court shall determine, in their discretion, that those facts shall be so ascertained; and certainly much time may be saved by this course of proceeding." "If, however, it is still insisted, that a hearing to some extent should be first had in order to understand the pertinency of the facts sought to be tried, we will hear counsel further upon that point." See 2 Dan. Ch. Pr. (4th Am. ed.) 1110, note (3); *Hoitt v. Burleigh*, 18 N. H. 390; *Eames v. Eames*, 16 Pick. 141; *Shaw v. Norfolk County Railroad Co.*, 16 Gray, 409; *O'Brien v. Bowes*, 4 Bosw. (N. Y.) 657. As to the right of a party to have issues of fact tried by a jury, see *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 417; 2 Dan. Ch. Pr. (4th Am. ed.) 1075, note (10); *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45, 47-49; *Shaw v. Norfolk Co. Railroad Co.*, 16 Gray, 407, 409. In Massachusetts, the order directing an issue for the trial of a question of fact by a jury, is regarded as interlocutory. *Eames v. Eames*, 16 Pick. 141; *Ward v. Hill*, 4 Gray, 595. So in Alabama, *Dabbs v. Dabbs*, 27 Ala. 646. See 2 Dan. Ch. Pr. (4th Am. ed.) 1079, 1080. In England the 21 and 22 Vict. c. 27, first enabled the Court to try questions of fact with or without a jury. This enactment, however, appears to be superseded by the 25 and 26 Vict. c. 42. In *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 419, Lord CAIRNS L. J., said: "The effect of these Acts is, to impose on the Court the duty of deciding questions, which, according to its former practice, were sent to be tried at law; and, in the absence of any direction to the contrary in the Acts, the Court must try them according to its ordinary course of practice. If the Court thinks it best that a question should be tried before a jury, a jury can be had; but if, in the opinion of the Court, a trial without a jury is preferable, neither party can claim a jury as a matter of right. It is a fallacy to say that under the old practice the Court required a legal question to be tried by jury. What it required was the judgment of a Court of Common Law. In most cases it was a necessary incident to proceedings at law that there should be the verdict of a jury before judgment; but these cases were sent to law, not that they might be tried by jury, but because this Court had no jurisdiction to decide upon legal rights." These remarks were made in a case of a bill for an injunction to protect a legal right; and it was held that the defendant in the bill could not *ex debito justitiæ* require to have such rights tried by a jury. See the remarks of CHAPMAN C. J., in the above cited case of *Stockbridge Iron Co. v. Hudson Iron Co.*, in which it was held that on a bill to reform a deed by inserting a clause alleged to have been omitted by common

The plaintiff was a coke manufacturer at Sunderland, and the defendant the owner of extensive collieries in Derbyshire. The bill was filed to enforce the specific performance of an agreement, dated the 4th August, 1859, alleged to have been entered into by the plaintiff and defendant, by which the defendant agreed to supply the plaintiff with 1200 tons of small coal per week at certain prices, with a proviso that the plaintiff was to be relieved from taking the coal during any period during which the coke trade might be in a state of stagnation. The agreement was alleged to have been made in substitution of a prior agreement between the same parties, one of the stipulations in which was that Barrow was to supply the plaintiff with 900 tons of small coal per week at 3s. per ton. The bill also sought an injunction to restrain the defendant from acting in contravention of the terms of the agreement.

The principal point in dispute between the parties was, whether a Mr. Heaton, who had professed to act as the defendant's agent, was authorized by him to enter into all the terms of the agreement?

Upon the case coming before the Master of the Rolls, his Honor directed a jury to be impanelled, under the recent Stat. 21 * 634 & 22 Vict. c. 27, to try the question of * authority, and the trial resulted in a verdict for the plaintiff. The defendant then moved before the Master of the Rolls for a new trial on the ground of misdirection of the Judge, and of the verdict being against the evidence. The Master of the Rolls refused the application, and the present motion was an appeal from that decision.

In the course of the argument, their Lordships expressed a doubt whether, whatever might be the ultimate decision of a jury upon the question of fact as to the authority of the agent, the agreement was one which the Court would decree to be specifically performed; and their Lordships suggested that, to save the expense of a new trial, if unnecessary, it would be advisable that the motion should be ordered to stand over, so that the residue of the argument upon it might be heard at the same time with the hearing on the equity reserved. The parties having agreed to adopt this suggestion,

mistake of the parties, the plaintiff cannot have an issue of the question of mistake framed for a jury as a matter of right, but the Court may frame such an issue at its discretion.

April 25.

The cause came on again for hearing upon the motion for a new trial and upon motion for decree upon the equity reserved.

Mr. R. Palmer, Mr. K. Macaulay, and Mr. Fooks, for the plaintiff. — There was no misdirection of the Judge, nor is the verdict against the evidence, and, therefore, there is no ground for a new trial. On the other point we submit that the agreement is, upon the face of it, one of which the Court would direct a specific performance; and that, at all events, to decide at once against the party in whose favour a verdict has been found upon an issue in the cause would be without precedent.

Mr. Lloyd, Mr. Lush, and Mr. H. Clarke, for the defendant — * The agreement is in many of its stipulations too * 635 vague to allow of a decree for specific performance; and some of these were misapprehended by Mr. Woodhouse, the person through whom the plaintiff carried on the negotiation for varying the terms of the original agreement.

The following authorities were referred to upon the question of specific performance: *Milnes v. Gery*, (a) *Gourlay v. The Duke of Somerset*, (b) *Watson v. Marston*, (c) *Lord Townshend v. Stan- groom*, (d) *Harnett v. Yielding*, (e) *Neap v. Abbott*, (g) *Holmes v. Eastern Counties Railway Company*, (h) *Duke of Devonshire v. Eglin*, (i) *Gregory v. Mighell*, (k) *Helsham v. Langley*, (l) *Duke of Beaufort v. Neeld*, (m) *Mounsey v. Burnham*. (n)

Judgment reserved.

May 2.

THE LORD CHANCELLOR. — After having deliberately considered this case on the motion and on the hearing, I am of opinion that the verdict ought to be set aside, without prejudice to the question

(a) 14 Ves. 400.

(b) 19 Ves. 429.

(c) 4 De G., M. & G. 230.

(d) 6 Ves. 328.

(e) 2 Sch. & Lef. 549.

(g) C. P. Co. 333.

(h) 3 K. & J. 675.

(i) 14 Beav. 530.

(k) 18 Ves. 328.

(l) 1 Y. & C., C. C. 175.

(m) 12 Cl. & Fin. 248.

(n) 1 Hare, 15.

whether the defendant made or entered into, or gave authority to make or enter into, the alleged agreement dated August 4th, 1859, in the pleadings mentioned; that, regard being had to the pleadings and the evidence, it is not necessary nor fit that another trial of this question should be directed; and that the bill ought to be dismissed, without costs, and without prejudice to an action on the agreement.

* 636 * It is unnecessary to comment upon the authorities cited, as there was really no disputed point of law between the parties; and I am desirous to avoid making any observations which might prejudice questions of fact hereafter to be tried.

Although there was no misdirection in point of law by the learned Judge who presided at the trial, I do not think that the verdict was such as ought to satisfy the conscience of the Court.

I further think that, upon the evidence, there could not have been a verdict on which the Court could properly act; and, that, although the authority for Heaton to sign the agreement had been established, yet, looking at the contents of the agreement, the manner in which it was made, and the probability of the defendant having been under a mistake as to some of its provisions, I think that this Court ought not to interfere either by ordering specific performance or granting an injunction as prayed by the bill.

Considering that the agreement was actually signed by Heaton professing to have authority to do so as agent for the defendant, and that the defendant has acted in contravention of this agreement, I think that the bill should be dismissed without costs.

But I think that the plaintiff should be left to any legal remedy he may have upon this agreement, and that the dismissal of the bill should be without prejudice to an action.

THE LORD JUSTICE KNIGHT BRUCE. — I think that, by the evidence before the jury and the other evidence in this cause,
* 637 the question of authority, * the question tried by the jury, is brought into a state of obscurity and left in doubt, and I am unable to represent myself as satisfied with the verdict.

If upon that question of fact it were, in my opinion, necessary to come to a conclusion, I should possibly desire another trial, but, in my judgment, no such necessity exists. I am of opinion that, however that mere question of fact ought to be answered, the bill should be dismissed, founding myself not merely on the obscurity

and doubt to which I have alluded, and which perhaps no investigation, no verdict, would remove to my satisfaction, but also on the nature and terms of the document of August, 1859, upon which the bill proceeds, and especially the second and fifth clauses of it. The uncertainty, the vagueness and the character generally of the document, but especially of those two clauses, render it in my judgment incumbent on the Court not to act in the present suit in favour of the plaintiff.

I think, however, that this is not a case for costs, and that the bill should be dismissed not only without costs, but also without prejudice to an action; our order being so worded as to leave the question of fact, upon which the verdict was given, open upon all future occasions.

THE LORD JUSTICE TURNER. — It appears to me also that the verdict in this case is not such as this Court can safely act upon. The evidence certainly does not so far satisfy my mind that Heaton had either a special authority to conclude the agreement in question, or a general authority under which he was warranted in concluding it, that I should feel justified in proceeding with the cause upon either of *those footings. The case, however, * 638 is one in which those questions may again come before a jury, and I fully agree therefore with the Lord Chancellor, that it would not be right for us now to state the precise grounds on which our conclusion on this point is founded. In this state of circumstances, the ordinary course would be to direct a new trial of the issue, but the parties have very wisely agreed to bring the whole case before us, and if upon the whole case we are satisfied that, even assuming that upon a further trial the issue should properly be found in favour of the plaintiff, there ought to be no decree in his favour, we ought not of course to put the parties to the expense and delay of a further trial.

I have considered, therefore, whether, upon the assumption which I have stated, this Court would act upon the agreement in favour of the plaintiff, and I am of opinion that it would not. This Court will not enforce or act upon an agreement, more especially if entered into by an agent, where there has been a mistake or misunderstanding as to the terms of the agreement; and, independently of other points which I abstain from advertg to, as any comment upon them might possibly affect future proceedings be-

tween these parties, I am perfectly satisfied upon the evidence that the defendant's intention was that, by the agreement to be entered into, he should be secured 3s. per ton for 900 tons, and that it was by mistake or misunderstanding, and as I think on the part of Mr. Woodhouse, that this intention was not, as it most certainly is not, carried out by the agreement. Upon this ground, in addition to those which have been already stated, my opinion is that, even assuming the authority of Heaton, this bill ought to be dismissed,

but of course without prejudice to any proceedings at law * 639 which the plaintiff may be advised to * institute, and without costs. It may be useful, perhaps, to add, although the point is not now before us, there being no motion to discharge the order for the issue, that I have read with much satisfaction the Master of the Rolls' observations in *George v. Whitmore*, (a) in which his Honor has laid it down that he will not, before the hearing, direct an issue to be tried by a jury in this Court, under the late Act, without the consent of counsel on both sides.

Speaking for myself, I think the rule so laid down quite correct, for in most if not in all cases no judgment can, before the hearing, well be formed either upon the question whether any issue ought to be directed, or to what particular points the issue ought to be addressed.

I think there should in this case be one order upon the motion for the new trial and upon the motion for the decree as follows:—

This Court, although not satisfied with the verdict of the jury as the ground of further proceedings in this cause, does not think fit to direct a new trial of the said issue, but doth order that the said verdict be not set up or used in any action or proceeding at law between the said parties, and that the bill in this cause be dismissed without costs and without prejudice to any action or other proceeding at law which the plaintiff may be advised to institute.

(a) 26 Beav. 557.

NOTE.—In the interval between the argument and delivery of the judgment in the above case their Lordships were furnished with an office copy of the decree made in *Armstrong v. Armstrong*, (3 Myl. & K. 45), as a precedent of a decree against the party in whose favour a verdict has been found upon an issue * 640 in the cause, upon the ground * that such an issue ought never to have been directed. The material part of the decree was as follows:—

MASTER OF THE ROLLS.

Tuesday, the 21st January, 1834.

Between Joseph Armstrong, Thomas Armstrong, Robert Armstrong, and Sarah Armstrong, spinster, Plaintiffs, v. Betty Armstrong, widow, Thomas Wood and Eleanor his wife, and Charles Lewis, James Frederick Duggin, and Richard Charnock, Defendants.

This cause, together with another cause then depending in this Court, wherein Charles Lewis, James Frederick Duggin, and Richard Charnock were plaintiffs, and Betty Armstrong, Thomas Wood and Eleanor his wife, Joseph Armstrong, Robert Armstrong, Thomas Armstrong, and Sarah Armstrong were defendants, coming on the 6th and 24th days of May, 1831, to be heard and debated before the Right Honourable the Master of the Rolls in the presence of counsel, &c., his Honor did order that the parties should proceed to a trial at law in his Majesty's Court of Exchequer at Westminster after Hilary term, 1832, or at such other time as the Judges of the said Court appoint, on the following issue; that is to say, first, whether at the death of Robert Armstrong, in the pleadings named, Samuel Shephard Warner was legally to be considered as a partner of Robert Armstrong, and entitled to receive payment at the rate of 10*l.* per cent on the capital advanced by him out of the profits or effects of the said concern; and secondly, if the jury should find that he was to be considered such partner and entitled to receive payment as above mentioned, then whether he was entitled to receive such payment on a sum of 4300*l.*, with liberty for the Judge to indorse any thing special on the *postea*. And at the trial the plaintiffs in the second-mentioned cause were to be plaintiffs at law, and the defendant Betty Armstrong was to be defendant at law, &c. And his Honor did reserve the consideration of all further directions and of the costs of these suits until after the trial of the said issue, and any of the parties were to be at liberty to apply to this Court as they might be advised: and that order was to be without prejudice to the question whether the said Samuel Shephard Warner and his representatives were properly made defendants in the above-mentioned cause. That the said parties proceeded to a trial of the said issues in his Majesty's Court of Exchequer, before Lord LYNDBURST, and the result of the said trial was a verdict by the jury in favour of the plaintiffs in the said issues: that the said defendant Betty Armstrong at the trial of the said issues tendered a bill of exceptions to the said Lord LYNDBURST: that, by an order made in this and the said other cause on the 15th March, 1832, it was ordered by consent that the defendant should get the bill of exceptions mentioned in the petition sealed; and it was ordered that the plaintiffs in the second-mentioned * cause enter up judgment on the verdict found within seven * 641 days; and it was ordered that the defendant prosecute such bill of exceptions by writ of error, and obtain the same to be argued in the Court of Exchequer Chamber, reserving to the Court all further directions as to the said issue and in the said causes until after the said bill of exceptions had been argued in the said Court of Exchequer Chamber, and also the consideration of the costs reserved by the said order directing the said issue and of the said applications. And it was ordered that the said defendant Betty Armstrong be at liberty, after the said bill of exceptions should have been decided, and notwithstanding the said judgment should have been so entered up, to apply for a new trial of the said issue, and any of the parties were to be at liberty to apply to the Court as they

might be advised. That, pursuant to the said last-mentioned order, the said bill of exceptions and other proceedings in the said issue were removed by the said defendant Betty Armstrong in the Court of Exchequer Chamber by writ of error in the usual manner, and the said writ of error came on to be argued before the said Judges of that Court, who, after taking time to consider their decision, on the 26th November, 1833, pronounced their judgment as follows: The Court have considered this record and the exceptions which are taken to it, and it has occurred to several of the Judges that these exceptions are not properly taken, and that no judgment could be given for the plaintiff in error for that reason upon this record. We are, however, of opinion there is another objection to the judgment being given upon this record, which is, that in point of fact, even supposing that it could be collected from the whole frame of it what the objection was, and that that objection could be fairly stated as arising from the record, it does not appear in point of fact, that any contract was made between the parties to carry on the partnership in such a manner as to contravene the Acts of Parliament: that clearly is no part of the written agreement that is set out, because the words "secret" or "suppressed" are nowhere used in that agreement. It is quite possible the parties may have had a collateral agreement to point to that object, and, if so, that would have the effect contended for on the part of the plaintiff in error; but that is a fact which ought to be found by the jury, and which the Court cannot infer from any state of facts laid before them for their decision, and the Court can only draw legal inferences from facts found by the jury. At the same time I may state, as the general opinion of the whole Court, that if there was an agreement proved to carry on the partnership in violation of those Acts of Parliament, that agreement would be void, and would confer no right on either party as against the other. It is possible that may be satisfactory without any further proceedings. We are of opinion the judgment must be affirmed.

* 642 And, this cause coming on this present day to be * heard and debated before the Right Honourable the Master of the Rolls for further directions on the equity reserved, and as to the matter of costs reserved also by the said orders, in the presence of counsel, &c., and upon hearing the said orders dated the 24th May, 1831, and 15th March, 1832, the said writ of error, with the transcript of the said proceedings in the Court of Exchequer thereto annexed, and the said judgment of the said Court of the Exchequer Chamber on the said writ of error, read, and what was alleged by the counsel on both sides, his Honor doth declare, that the indenture of the 24th day of June, 1810, in the pleadings of this cause mentioned, made between the late defendant Samuel Shephard Warner of the one part, and Robert Armstrong, deceased, the testator in the pleadings of this cause named, of the other part, was illegal and void, and that the said late defendant Samuel Shephard Warner was not a partner with the said intestate in the business of a pawnbroker carried on by him and in his own name in Baldwin's Gardens, Leather Lane, in the county of Middlesex, or with the defendant Betty Armstrong, the administratrix of the said intestate, in the same business carried on by her in her own name in the same place since the decease of the said intestate. And it is ordered, that the plaintiffs do pay unto the defendants Betty Armstrong, Thomas Wood, and Eleanor his wife, so much of their costs of this suit as have been occasioned by the said claims of a partnership set up by the

said late defendant Samuel Shephard Warner, and by his executors, the defendants Charles Lewis, James Frederick Duggin, and Richard Charnock, to be taxed by the Master of this Court in rotation. And it is ordered, that the defendants Charles Lewis, James Frederick Duggin, and Richard Charnock, out of the assets of the said late defendant Samuel Shephard Warner, do pay unto the plaintiffs so much of their costs of this suit as have been occasioned by the said claims of a partnership, to be taxed by the Master, and also the amounts to be paid by the said plaintiffs pursuant to the directions hereinbefore contained to the said defendants Betty Armstrong, Thomas Wood, and Eleanor his wife, for their costs as above directed; and in case the said defendants Charles Lewis, James Frederick Duggin, and Richard Charnock shall not admit assets of their testator Samuel Shephard Warner, sufficient for that purpose, it is ordered that they do come to an account before the said Master for the personal estate of the said Samuel Shephard Warner come to their or any or either of their hands, or to the hands of any person or persons by their or any or either of their order, or for their or any or either of their use. And it is ordered, that Mr. Richard Mills, the clerk in Court of the said defendants Charles Lewis, James Frederick Duggin, and Richard Charnock do, within thirty days, deliver up to the defendant Betty Armstrong the indenture of lease in the said pleadings mentioned, bearing date the 7th May, 1814, and made between Henry Dyson Gabell and George Talbatt, esquires, of the first part, James Henry * Leigh, esquire, * 643 and Chandos Leigh, esquire, of the second part, and the said intestate Robert Armstrong of the third part, and which said indenture of lease was deposited with him the said Mr. Mills by the said defendants Charles Lewis, James Frederick Duggin, and Richard Charnock, pursuant to an order in this cause bearing date the 20th April, 1830. And upon the said defendants Charles Lewis, James Frederick Duggin, and Richard Charnock paying to the plaintiffs the said several sums pursuant to the direction hereinbefore contained, it is ordered, that the plaintiffs' bill do stand dismissed out of this Court against the said defendants. — *Reg. Lib., A., 1833, fol. 668.*

FISHER v. BRIERLY.

1860. Feb. 24. March 5, 6. May 4. Before the LORDS JUSTICES.

In 1851, a lady of large property granted by deed, in manner prescribed by 9 Geo. 2, c. 36, two acres of land, of the yearly value of about 8*l.*, to trustees, upon trust to permit a church, parsonage, and school to be built thereon, with power for the persons who should provide funds to make regulations as to the use of the land for those purposes. She did this with the intention of leaving money by will for those purposes. She died in 1857, leaving a will, by which she gave large legacies for the building and endowment of the church and school. The deed remained in her possession

till a short time before her death, and there was some evidence to show that during her life she retained the use of the land.

Held, on the construction of the deed, that there was not any resulting trust for the grantor until the church was built, and that the deed therefore was not upon the face of it void under 9 Geo. 2, c. 36, as containing a reservation for the benefit of the grantor.

Held, that a grantor's retaining such a deed in his possession, and continuing in the occupation of the land, are not conclusive evidence of the existence of an agreement or understanding between him and the trustees, that he shall retain the benefit of the land for his life, but only evidence to which more or less weight is to be attached according to the circumstances of the case;¹ and that under all the circumstances of the present case, and having regard to the opposing evidence, those facts were insufficient to establish the existence of any such agreement or understanding, and that the deed therefore was not invalid under 9 Geo. 2, c. 36, on the ground of a secret trust for the benefit of the grantor.

Held accordingly, that the deed was valid, and that the gifts of the legacies had not failed.

Seemle, that if the grant had been invalid under 9 Geo. 2, c. 36, it would nevertheless have been supported by 43 Geo. 3, c. 108, and 4 & 5 Vict. c. 38.

Seemle, that under those Acts it is not necessary that a grantor should part with his whole interest in the land.

A decree having been made declaring the deed and legacies void, and directing the usual accounts of the real and personal estate of the testatrix, a defendant, who was one of the trustees of the deed, and one of the executors, appealed from so much of the decree as declared the deed and the charitable legacies void. *Held*, that the plaintiff was not entitled to begin.²

THIS was an appeal by the defendant Brierly from so * 644 much of a decree of the Master of the Rolls as * declared a grant of land by Miss Lambert, the testatrix in the cause, to be void under 9 Geo. 2, c. 36, and certain legacies given by her will for building and endowing a church and schools to be erected on that land, to be also void.

The testatrix Miss Lambert was a lady of fortune residing at Boarbank House, in Cartmel, in Lancashire. In the year 1851 she was desirous of making a provision for the building and endowing a church and schools in the parish of Cartmel. She wished to devise land for this purpose, but her solicitor, Mr. Reveley, advised her that she could not do so, but must convey it to charitable purposes at once. She thereupon instructed him to prepare a conveyance to trustees of a small piece of land belonging to her.

This conveyance, when completed, bore date the 14th of May,

¹ See *Lewin Trusts* (5th Eng. ed.), 78.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1484 and notes 7 and 8, 1485.

1851, and was made between Miss Lambert of the one part, and the defendant Brierly, Mr. Reveley, and Robert Wilcock, of the other part, and thereby, after reciting the desire of Miss Lambert that a chapel should be erected for the benefit of the inhabitants of the township of Lower Allithwaite in Cartmel, and that a dwelling-house for the residence of a clergyman, and a school-house for the education of the children of the labouring classes of that township, should also be built, and that, in order to effect that object, she had agreed to make the grant thereafter contained, Miss Lambert granted a piece of land, therein described, containing about two acres, unto and to the use of the trustees upon the following trusts :—

“ Upon trust to permit to be erected and built upon part thereof a church or chapel for the worship of Almighty
 * God, according to the rites and ceremonies of the United * 645
 Church of England and Ireland, as by law established, with or without a cemetery to be annexed ; and also a messuage or dwelling-house, with a yard, garden, and suitable offices, to be occupied therewith, for the residence of the minister who shall for the time being officiate in such church or chapel as aforesaid ; and also a school-house with suitable offices, and with or without a play ground, and with or without a residence for the mistress who shall teach therein, to be used for the education of the children of the labouring classes of the said township of Lower Allithwaite ; with full power for the person or persons who shall provide the funds for the erection of such church or chapel and other buildings as aforesaid, to make such regulations respecting the use thereof for the aforesaid purposes respectively as he, she, or they shall think proper.”

This deed was executed by Miss Lambert, and was duly enrolled in manner required by 9 Geo. 2, c. 36. After its execution it was at first left with Mr. Reveley ; but a few months afterwards it was, at Miss Lambert's request, given by him to her, and put, with her deeds and papers, in her strong box at Boarbank House, and kept there until shortly before her death. This, according to Mr. Brierly's evidence, was done at his own suggestion.

Contemporaneously with the preparation of this deed Mr. Reveley prepared a will for Miss Lambert, which was executed by her, and

by which she bequeathed legacies for building a church, parsonage-house, and schools on the above-mentioned piece of land, and for endowment of the church. On the 6th of November, 1857, she revoked her will and made a new one, by which, after * 646 reciting the deed of grant before mentioned, she, * "in order to carry out and effectuate the trusts, intents, and purposes of the said indenture;" gave to Mr. Brierly, Mr. Dickinson, and Mr. Woodburne, her trustees and executors, 2500*l.* for building a church on the land, 1500*l.* for building a parsonage, 1000*l.* for building schools, 1500*l.* as a fund for a salary for a schoolmistress, and 500*l.* as a fund for supplying books for the school. She also gave 5000*l.* to the Bishop of Chester, as a fund for a stipend for the clergyman. After bequeathing various other legacies, she gave all the residue of her property to various persons named in her will. By a codicil she made some variations not material to be stated. With a view to the preparation of this will Miss Lambert took the deed of grant from her box and gave it to Mr. Woodburne, in whose custody it thenceforth remained.

The testatrix died on the 29th of November, 1857, and the will was proved by all her executors.

The bill in this cause was filed by Mrs. Fisher, one of the residuary legatees, against the surviving trustees of the deed of 1851, the executors of Miss Lambert's will, the other residuary legatees, and the Attorney-General. The bill, after stating the deed of grant, alleged that, at the time of its execution, there was a secret understanding and agreement between Miss Lambert and her trustees, that the trusts of the deed should not be performed during her life; but that she should, during her life, continue in the possession or receipt of the rents for her own use and benefit. The bill prayed that it might be declared that the deed of grant was void, and that the legacies given for the purposes before mentioned were also void; and for the usual accounts of the real and personal estate, and the carrying into effect the trusts of the will, subject to these declarations.

* 647 * The evidence adduced by the plaintiff in support of the allegations contained in the bill was as follows: Four persons, who had been in the service of Miss Lambert, stated that from the year 1851, until her death, the piece of land comprised in the deed had been in her occupation; that it had been manured from her stables, and generally cultivated by her servants, that

the hay produced from it had been taken to Boarbank House, and consumed by her horses, and that the grain produced by it had been consumed, either at Boarbank House or on a farm belonging to her and in her own occupation. The rate collector deposed that no change had been made in the rating after 1851, and that Miss Lambert had been rated as the occupier until her death.

The other circumstances appearing in evidence were as follows : At the date of the deed, Miss Lambert was 61 years of age. Her fortune consisted of real and personal estate, which were estimated to be of the value of about 80,000*l.*, and produced about 2500*l.* a year. Mr. Wilcock, who was named as a trustee in the deed, had been in her service for many years, and was her confidential adviser and general manager. He resided at Boarbank House, and occupied two farms belonging to her, called Lane-side and Kent's Bank, as tenant, and managed another farm belonging to her and in her own occupation, called Outerthwaite, as bailiff. He died in August, 1857. The accounts between him and Miss Lambert, in her possession, were in a very confused state, it appearing that he was in the habit of paying sums generally on account. He was largely indebted to Miss Lambert at his death. The piece of land in question consisted of two acres, and was worth, to sell, about 80*l.*, and to let, about 3*l.* a year. It was separated from the * other property of Miss Lambert; * 648 and was not desirable or convenient to be held either with the grounds of Boarbank House or with any of the farms of Miss Lambert. It did not appear whether it had before 1851 been occupied with the farms rented by Mr. Wilcock or the farm managed by him as bailiff. It was proved by a witness who had been in Wilcock's service from 1854 until his death, that the same horses, ploughs, and instruments of husbandry were used by Wilcock for all the farms ; and that the cattle, both of Wilcock and Miss Lambert, were kept on the three farms and the piece of land in question without any distinction, and that he always supposed that Wilcock occupied all the farms. There was no further evidence as to the occupation of the piece of land since 1851.

Mr. Reveley deposed that, at the time of the execution of the deed, he had explained to Miss Lambert that she was to make an absolute grant, reserving nothing to herself, which she seemed to understand. He positively denied any such agreement or understanding whatever with Miss Lambert as was alleged by the bill,

and stated that he had not interfered in the trust because as there was no church or school in existence he should not have known what to do with the rents, and that he had supposed that at Miss Lambert's death the arrear would be paid up and added to the trust fund. Mr. Brierly positively denied the existence of any agreement or understanding between him and Miss Lambert as to her retaining the land during her life; and stated that, as he resided 100 miles off, and his two co-trustees resided on the spot, and one of them was a solicitor, he had left the matter to them, and had taken it for granted that they would do whatever was necessary. He also stated that, shortly after the execution of * 649 the deed, Miss * Lambert had said to him, "I have given it" (meaning the piece of land), "and I will have nothing more to do with it; but as Wilcock is always complaining of shortness of grass on his farm, you had better let him have it."

The Master of the Rolls considered that the case was not distinguishable from *Way v. East*, (a) and decided that the gift of the land was invalid under 9 Geo. 2, c. 36, by reason of there being a secret reservation for the benefit of the grantor. His Honor also considered that the bequest was invalid, its object having failed by reason of the failure of the gift of the land. His Honor accordingly made a decree declaring the grant and the legacies void, and directing the usual accounts of the real and personal estate of the testatrix. The defendant Brierly appealed from so much of this decree as declared the grant and legacies void.

Mr. Roundell Palmer, for the plaintiff, claimed the right to begin.

Mr. Follett, for the appellant, referred to *Harrison v. Guest*. (b)

THE LORD JUSTICE TURNER. — I consider the rule to be that the appellant begins in every case except that of an appeal from the whole decree, the reason of the exception being that on an appeal from the whole decree the plaintiff may read different evidence and shape his case differently.

* 650 * THE LORD JUSTICE KNIGHT BRUCE. — I do not lay down any general rule, but finding a precedent applicable to the

(a) 2 Drew. 44.

(b) 6 De G., M. & G. 424, 429.

present case on a point which, in my judgment, is of small importance, I follow it.

Mr. Follett, Mr. Shapter, and Mr. B. L. Chapman, for the appellant. — *Way v. East* (a) lays down the rule which the Master of the Rolls considered applicable to the present case, that if at the time of the execution of the deed there is a secret understanding that it shall not take effect at once, but that the grantor shall retain the present enjoyment of the property, the deed is void under 9 Geo. 2, c. 36. We do not dispute the soundness of this principle, but its applicability to the circumstances of this case. There are two questions: (1.) Whether such a secret understanding is proved; (2.) We say that the case is not governed by 9 Geo. 2, c. 36, but by 43 Geo. 3, c. 108, and 4 & 5 Vict. c. 38; and the second question therefore is, whether the understanding, if proved, would invalidate the deed under those statutes.

As regards the first point, the cases are in our favour, as showing that circumstances such as are proved here are not sufficient evidence of such a secret understanding. In *Way v. East*, (a) the rent-charge was never paid, nor any attempt made to enforce payment for eleven years. *Grieves v. Case* (b) is directly in our favour. In *Attorney-General v. Munby*, (c) it was contended that the grantor's keeping the deed in his own possession amounted to a reservation for his own benefit, but Sir *WIL- *651 LIAM GRANT decided the contrary, though he allowed that such a circumstance would go into the scale along with others as an evidence of intention. The law is similarly laid down in *Doe d. Thompson v. Pitcher*, (d) with respect to the grantor's retaining possession of the land contrary to the terms of the deed. In *Attorney-General v. Poulden*, (e) there was the additional circumstance of a reconveyance by the trustees, which was a circumstance strongly tending to establish the existence of a secret trust for the grantor. Such circumstances, as retaining possession of the deed or of the land, do not defeat the grant; they are only evidence, so far as they go, of a secret agreement which would defeat it, but in determining whether they are sufficient evidence of it, the Court

(a) 2 Drew. 44.

(b) 2 Cox, 301; 4 Bro. C. C. 67; 1 Ves. Jr. 548.

(c) 1 Meriv. 327.

(d) 3 M. & Sel. 407.

(e) 8 Sim. 472; 8 C., *sub nom.* Att.-Gen. v. Bricknell, 1 Jur. 540.

must decide like a jury looking at all the circumstances of the case, and it is quite absurd to suppose that this rich lady intended a reservation in her favour as to this insignificant bit of land. We contend, therefore, that this deed would be good, even if its validity depended only on the Stat. 9 Geo. 2, c. 36.

But we say that the deed is one authorized by and supported by the Stat. 43 Geo. 3, c. 108. A statute enabling persons to give land for a specific purpose dispenses with the restrictions of 9 Geo. 2, c. 36. *Barnaby v. Bardsley*. (a) The Master of the Rolls held, that a grant under this Act is not good, unless the grantor parts with all his estate. This we submit is erroneous. It is not, as we contend, a just construction to make the general words of the Act, which speak of granting all the estate, operate as a prohibition

of granting a less interest. The Act is opposite in spirit to * 652 the Mortmain Act, its object * being to encourage grants of land for the purpose of building churches; it contains no restrictive words, and the interpretation put upon it by the Master of the Rolls tends to defeat its object. A man may under it give land by will for this purpose; if so, why may he not grant a reversion for the same purpose? It is true, that in *The Incorporated Society v. Coles*, (b) the Vice-Chancellor says: "Regarding the provisions of the Statute of Mortmain, I am bound in construing this Act with reference to it, to hold that when the legislature says a person may pass 'all such his estate or interest,' that must mean without reserve, as is provided in similar cases by the Statute of Mortmain." The appeal did not settle this point, but we submit that the principle cannot be supported. [*Attorney-General v. Bishop of Chester*, (c) *Downing College Case*, (d) were also referred to.] The Stat. 43 Geo. 3, c. 108, was intended to introduce a new rule. The Stat. 43 Geo. 3, c. 107, passed on the same day, assumes that the re-enacting the Stat. 2 & 3 Anne, c. 11, § 4, would take a case out of 9 Geo. 2, c. 36. This throws light on c. 108, and shows that it was not intended that 9 Geo. 2, c. 36, should be imported into it. Assuming, therefore, that the Master of the Rolls was right in his view of the facts, this statute supports the transaction.

Again, Stat. 4 & 5 Vict. c. 38 supports the gift of so much of

(a) 28 L. J., Exch. 326.

(b) 1 K. & J. 145; S. C., on appeal, 5 De G., M. & G. 324.

(c) 1 Bro. C. C. 444.

(d) Shelf. Charities, 139, 140.

the land as was devoted to the purpose of a school, even if the gift of the whole cannot be supported on the grounds which we have urged. The trustees must have apportioned the land, and as to the part apportioned to the school, the gift must be supported. * *Edwards v. Hall*, (a) *Attorney-General v. Mill*, (b) * 653 *Baldwin v. Baldwin*. (c) *Philpot v. St. George's Hospital*, (d) shows that if the land was effectually given, the bequest of money to be employed in building upon it is good. It is impossible to understand the distinction which has been attempted to be drawn between cases where the gift of the land is good under 9 Geo. 2, c. 36, and those where it is good only by virtue of 43 Geo. 3, c. 108.

It has been urged, that the giving to a charity by act *inter vivos* a bit of worthless land, and then bequeathing a large sum to build upon it, is an evasion of the statute. But there is no such thing as evading a statute; a case either is within the purview of a statute or is not; if it is not, it is of no consequence that it is ever so like something that is within, or that it is a case which the framers of the statute would probably have included, if they had thought of it. *Baldwin v. Baldwin*, (c) *Veitch v. Trustees of the Exeter Turnpike Roads*. (e).

Mr. Wickens appeared for the Attorney-General, and supported the appeal.

Mr. Roundell Palmer and Mr. Speed, for the plaintiff, and Mr. Lloyd, Mr. Joseph Brown, and Mr. Schomberg, for the other residuary legatees, in support of the decree. — The first question is, whether the gift of the land is good under 9 Geo. 2, c. 36, and we submit that it is not. According to that statute the land must be conveyed * without any reservation, trust, condi- * 654 tion, or agreement for the benefit of the grantor. Now, it is not necessary that a reservation should appear on the face of the conveyance; its existence may be made out by parol evidence and by the conduct of the parties. *Way v. East*, (g) *Attorney-General v. Poulden*, (h) *Attorney-General v. Bricknell*, (i) *Limbrey*

(a) 6 De G., M. & G. 74.

(b) 3 Russ. 338.

(c) 22 Beav. 413.

(d) 6 H. L. Cas. 338.

(e) 8 El. & Bl. 986.

(g) 2 Drew. 41.

(h) 8 Sim. 472.

(i) 1 Jur. 540.

v. Gurr. (a) · Here the grantor originally expressed her intention to retain the rents and profits during her life ; finding that such a reservation would invalidate the gift, she appeared to abandon it, but it never was really abandoned, and the evidence shows that it was acted upon all through the remainder of her life. The land remained in her own occupation. The produce was applied to her own use during her life, and was received by her executors after her death, and the deed which had been handed back to her as soon as it was enrolled, remained in her own custody. The gift moreover was of such a nature that it could not take effect until funds were provided. The rents in the mean time resulted to the donor. This amounts to a reservation, the gift was not to take effect immediately. The deed is void on the ground of perpetuity, for the trust does not come into effect till there are funds ready for building a church, and it is impossible to say what time might have elapsed before that happened. Again, the grantor intended to provide those funds by will. She never intended that a church should be built during her life, so during her life the land really was not devoted to charity at all. The transaction was a fraud on the statute, a mere colourable gift to enable her to bequeath money for charitable purposes connected with land. We contend, therefore, that under 9 Geo. 2, c. 36, the gift of the land cannot be supported.

* 655 * The other statutes referred to by the appellants do not support the grant. The Stat. 4 & 5 Vict. c. 38, contains no power of apportionment, it makes good a gift of a certain amount of land for the purpose of a school, but it does not authorize the apportionment of a larger gift for mixed purposes, so as to make it *pro tanto* good. The Stat. 43 Geo. 3, c. 108, does not help the appellant's case, for its language plainly imports that the whole interest of the grantor must be parted with. That is the proper meaning of the words, and as this statute creates an exception from a previous disabling statute, it must be construed strictly. The same objection also arises as under the other statute, that this Act only authorizes a gift for a church and parsonage, and does not provide for apportionment of a larger gift for purposes including other objects. *Cramp v. Playfoot*, (b) *Chapman v. Brown*, (c)

(a) 6 Madd. 151.

(c) 6 Ves. 404.

(b) 4 K. & J. 479.

Attorney-General v. Bishop of Chester, (a) Corbyn v. French. (b) Another objection arises under the 2d section, which does not authorize a double gift, the gift of land by deed and then of money by will. Moreover, the consent of the ordinary is required under that statute, and was not obtained in the present case.

Mr. Follett, in reply. — There is nothing in this case approaching to such an agreement as would invalidate the gift under 9 Geo. 2, c. 36. The whole case of the respondents on this point rests on the possession of the deed and of the estate. These alone are not conclusive evidence of such an agreement, and the direct evidence is clear to the point that there was not any such agreement.

There was no resulting * trust, for none arises on gifts to * 656 a charity. *Lewin on Trusts. (c)* Even if there was a resulting trust or a secret agreement, the Statute 43 Geo. 3, c. 108, supports the gift. To hold that this statute requires a grantor to part with all his interest would be a gratuitous importing a provision contained in a restrictive statute into an enabling statute, a statute, moreover, authorizing dispositions by will to which such a restriction would be utterly inappropriate. This Act is remedial, intended to give for important objects a power which did not exist before, and it is to be largely construed. The addition of the school does not exclude the operation of that Act; the Court will have no difficulty in ascertaining how much of this gift ought to be applied to one object and how much to the other.

Judgment reserved.

May 4.

THE LORD JUSTICE KNIGHT BRUCE. — In the appeal of which we are now to dispose the main or single question is of the validity or invalidity of a deed dated the 14th of May, 1851, which has been produced and proved in the cause, and is particularly mentioned in the bill. It purports to be a conveyance by Miss Lambert (the testatrix in the suit) of a freehold close of land in Lancashire that belonged to her, — a conveyance namely to three trustees in fee for charitable purposes. It was an indenture executed by her and attested in conformity with the provisions, and enrolled in due time agreeably to the requisitions of the Statute 9 Geo. 2, c. 36.

(a) 1 Bro. C. C. 444.

(b) 4 Ves. 418-433.

(c) Page 198.

The lady lived for some years afterwards. The contention * 657 of the plaintiff is that by that * Act of Parliament the deed is rendered invalid, and that accordingly the close of land has not been effectually appropriated to any charitable purpose. And, first, the plaintiff says that the deed left a resulting trust of the land in favour of the grantor, or a benefit to the grantor from it until a church or chapel or some building should under the deed be erected on the land, and that therefore, *ex facie*, the Statute 9 Geo. 2, c. 36, destroys it. That, however, is not my opinion. As the case appears to me, the land, according to the tenor of the deed, was immediately and absolutely and irrevocably devoted by the deed to charitable purposes of a lawful kind from the moment when she executed it, and if it can be successfully impeached, it can, in my opinion, only be so by matter collateral or extraneous.

Certainly the testatrix originally intended to give by will, for the purposes expressed in the conveyance or for similar purposes, the land comprised in the conveyance, but having been informed that she could not do this by will she resolved on having a deed instead, and executed the deed in question accordingly. The circumstance that before and when and after she executed it there existed in her mind an intention to give by will sums of money to be expended in building on the land and endowing a church or chapel and a school there, can make no difference. It has, however, been contended for the plaintiff that the Statute of Geo. 2 destroys the deed, if on no other ground, at least on this, namely, she alleges that there was contemporaneously or in connection with the deed a trust created, or professed and expressed to be created, verbally, or a stipulation or compact verbally made, or what is familiarly called an understanding constituted, by Miss Lambert, or between her on one side and all or some or one of the three trustees of the deed on the other, the nature, design, and meaning of which trust or * 658 * stipulation, compact, or understanding (as the plaintiff insists) were that Miss Lambert should be at liberty at any time, if so disposed, to cancel the deed and put an end to the trust purporting to be created by it, and besides should, notwithstanding the deed, be during her whole life, or so much of it as she should think fit, or at least until the construction or formation in her lifetime upon the land of a chapel, or school, or dwelling-house, or cemetery, or the commencement of works for the purpose, left in the undisturbed possession or use and enjoyment of the land

for her own benefit. And it does appear, in fact, from the evidence (or at least it may be and has been fairly argued, and I assume it to do so) that the testatrix was never disturbed in the possession or enjoyment of the field comprised in the deed, but after as before the deed until her death continued to take and enjoy the produce and profits of the field without paying rent or accounting for any part of the produce or profits to any person, or being asked to do so; and from the time of the enrolment of the deed, or from the end of three months, or for a less period afterwards, had, and while living continued to have, the deed in her sole custody actually or potentially. These circumstances are, I apprehend, not of themselves sufficient to prove the existence of such a trust, or stipulation, or compact, or understanding, as has been mentioned; and upon a full consideration of the whole evidence in the case, oral and documentary (including the testimony of Mr. Wilson, but of course including also that of the defendants who have been examined as witnesses), I am satisfied that the affirmative of the proposition that some or any such trust or stipulation, compact, or understanding did, whether effectually or ineffectually, exist in fact, has not been proved, and I am satisfied, moreover, that in the sense in which the negative of the proposition can properly be said to be proved, that negative stands established. The *trustees may very possibly have been *659 too indulgent or negligent, and they may possibly be liable to account in consequence of having so conducted themselves. That is not now the question; but I am convinced that had they at any period of the testatrix's life, after the execution or enrolment of the deed, insisted on having the custody of it, or insisted on being let into the possession or receipt of the profits of the land included in it, they would not by doing so have acted in breach of any valid or invalid, effectual or ineffectual, agreement, promise, engagement, or trust to the contrary.

My opinion is that the deed has not been successfully impeached under the Statute 9 Geo. 2, c. 36, and ought to be taken as being for all purposes legally and equitably valid. Not one of the disputed bequests, therefore, seems to me void or ineffectual. Thus viewing the case, I have thought it not necessary to enter into the construction or effect of either of the statutes of Geo. 8 and her present Majesty, which were mentioned during the argument. I am, however, not persuaded that if, independently of those statutes, it

would be right to consider the deed and bequests as invalid, they would not from those statutes receive effectual support and be sustained by them. I conceive that the decree before us should be varied to the extent that I have mentioned, and that the costs of all parties of the present rehearing, as between solicitor and client, should be paid out of the testatrix's estate in the same manner as the costs given by the decree.

Of course I have not come to the conclusion that I have stated without having considered the cases of *Limbrey v. Gurr*,^(a) and *Attorney-General v. Poulden*,^(b) both mentioned in the argument.

* 660 * THE LORD JUSTICE TURNER.—Having considered this case, I have been unable to bring my mind to the conclusion at which the Master of the Rolls has arrived. The first point in the case is, whether the deed in question conveying to trustees two acres of land to charitable purposes is void as being contrary to the Statute 9 Geo. 2, c. 36, usually called the Mortmain Act. It is urged against the validity of the deed, that the donor had the possession of it and the enjoyment of the land comprised in it for some years after its execution, and as it is said, up to the time of her decease, and that from these facts we ought to assume that there was an agreement or understanding between the donor and the trustees of the deed that the donor should have the enjoyment of the land during her life, and that the charitable purpose expressed in the deed should only take effect upon her death. Such an agreement, it was said, would make the deed altogether void, and no doubt it would, for it would be a fraud upon the law, and a deed in fraud of the law can no more be supported than any other fraudulent deed; but the facts on which we are called upon to assume this supposed agreement or understanding are evidence and evidence only of its existence, and the weight which is due to facts of such a nature must in each case depend upon its own particular circumstances. Facts which in one case might afford very strong evidence of there having been such an agreement or understanding might in other cases furnish but a very slight presumption of it. In this case, Wilcocks, one of the trustees of the deed, was the steward or bailiff of the donor, and seems to have had during his life almost the entire manage-

(a) 6 Madd. 151.

(b) 8 Sim. 472.

ment of her affairs. She had a safe in which her title-deeds were kept, and it is not, I think, much to be wondered at, that the steward should have placed this deed and * permitted it to * 661 remain in a place of safety amongst her title-deeds. There is no evidence that the donor herself gave any directions for its being so deposited, and upon the death of the steward, which took place a few months before the donor died, the deed seems to have been removed from the safe and taken out of the donor's custody by the order of one of the surviving trustees. Again, as to the possession of the land. The donor was a large landed proprietor, and this was a small field only. Wilcocks, one of the trustees, had the actual possession of it, and there is no evidence to show that he ever accounted to the donor for any rent in respect of it. Her coach-horses seem to have been occasionally turned out in the field, and some hay which was grown in it appears to have been consumed in her stables. The evidence on this part of the case goes, I think, no further. I should hesitate long before upon such evidence as this, even if it stood uncontradicted, I could venture to suppose that there was any such agreement or understanding as we are required to assume, but when I find from the evidence on the other side that both the surviving trustees positively deny that any such agreement or understanding ever existed, and that this denial is coupled with a statement that in a conversation shortly after the execution of the deed which had reference to the interim possession of the land, the donor said she had given the land and would have nothing more to do with it, I find myself satisfied as to the conclusion we ought to arrive at on this part of the case. I think it clear that we could not be justified in presuming that there was any such agreement or understanding as we have been required to assume. The case of *Way v. East*, (a) which was referred to in the argument, does not seem to me in any degree to apply to such a case as * the present. It was very forcibly urged * 662 in argument on the part of the plaintiff in support of the presumption to which I have referred, that this deed was connected with the will of the donor, by which the funds for carrying into effect the charitable purpose were to be provided, and which of course would take effect upon her death; but the fact that the donor intended by her will to provide the funds for effectuating her charitable purpose, whatever its effects may be in another point of

(a) 2 Drew. 44.

view, to which I shall presently advert, does not seem to me to lead to the conclusion that the donor intended to reserve to herself any interest in the mean time and until the charitable purpose was effected. At all events, I think that the presumption, if any, to be derived from this fact is wholly rebutted by the positive evidence to the contrary to which I have referred.

Another and more plausible argument, however, leading to the same conclusion of a reserved interest in the donor, was founded upon the construction of this deed. It was argued, that upon the true construction of the deed, there would be a resulting trust for the donor until the charitable purpose took effect, but it seems to me that by this deed the land was absolutely and immediately dedicated to the purposes of charity, and that it would be quite inconsistent with that dedication to hold that any beneficial interest remained in the donor. The true test of this argument is, whether the donor could herself at any time after the execution of this deed have maintained any claim against the trustees in respect of this land, or the profits of it, and I am quite satisfied that she could not.

It was attempted too, on the part of the plaintiff, to found some argument in her favour upon the ground of perpetuity, but
 * 668 if the land was well given to charity, * perpetuity is the necessary consequence, and I do not see, therefore, how any argument on that point can be brought to bear upon the case.

It was said, however, that to treat this land as well given to the charity and to permit this charitable gift to take effect would be to sanction an evasion of the statute referred to. But if the law has permitted an act to be done, and has prescribed the mode in which it may be done, what authority has this Court to say that the act shall not be done in the mode which the law has prescribed? This Court, indeed, has full power over instruments which contravene the law. It may set them aside or refuse to act upon them. It may go further, and may exercise the same powers over instruments which, although within the letter of the law, contravene its policy, as was the case with reference to the Ship Registry Acts, but I do not see how what is done *modo et forma* which the law has prescribed, can be said to be contrary to its policy. There is a marked distinction which perhaps has not been sufficiently attended to in some of the cases upon this subject, between evasion as it has been called and contravention, and it is against contravention, and not

against what has been termed evasion, the power of this Court is directed. I agree with what was said by Lord CRANWORTH upon this subject in *Edwards v. Hall*. (a) What I have already said is, I think, sufficient to dispose of this case, for if this deed be valid, of course the legacies are valid also, — a gift of money to be laid out on land already in mortmain being undoubtedly good.

But the Master of the Rolls has gone further. Assuming the deed to be invalid under the 9 Geo. 2, c. 36, he * has * 664 gone on to say that it is not valid also under the 43 Geo. 3, c. 108. [His Lordship read the preamble and the first section of this statute.]

With all possible respect to his Honor's judgment, and to what appears to have fallen from the Vice-Chancellor Sir W. PAGE WOOD upon the same point, I cannot agree with the limited construction they have put upon this latter statute. They have held, as I understand this judgment and the dictum of the Vice-Chancellor, that because the statute says that any person having an estate or interest in land in possession, reversion, or contingency, may (within the limits prescribed), by deed or will, give or grant all such his, her, or their estate or interest for such charitable purposes as are mentioned in the statute, no valid gift or grant can be made if there be any reservation in favour of the donor. I venture to differ from both the learned Judges upon this point. This statute is not, as I read it, a statute merely conferring a parliamentary power. It is, as I understand it, a statute having for its object the removal of a disability in the owners of lands to give them to the charitable purposes specified in the statute, and if the disability be removed as to all the estate and interest, it seems to me that it must be removed as to every portion of it, as to an estate in remainder or reversion no less than as to an estate in possession. It cannot, I think, possibly be denied that under this Act the donor could devise the land for the purposes mentioned in the statute. He could enjoy the land therefore during his life, and give it by his will at his death to the charitable purposes. Could it be intended that he should be at liberty to do this and yet should not be at liberty to settle the land on himself for life, and afterwards for the charitable purposes? Again, there is nothing which I can find in the statute pointing to a reservation in favour of the donor only, and if the * construction put upon the Act be correct, no owner * 665

in fee could give less than the fee, and no termor could give less than his whole term. No disposition less than the fee, or the whole term, would satisfy the words, "all his estate and interest." Looking to these points and to the plain object and purposes of the statute, I should most respectfully differ from the Master of the Rolls on this point also, if it was necessary to decide it.

A further point was also attempted to be raised in the argument of this case, with reference to the portions of the land devoted to the church and the school being undefined in the deed; but in the view which we have taken of this case it becomes unnecessary, I think, to come to any decision upon this point. I may add, however, that the argument did not by any means satisfy me that there was any difficulty in the question.

Upon the whole I am of opinion that this decree must be altered in the points complained of.

[516]

AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABROAD. See **BILL OF EXCHANGE**, 2. **INJUNCTION.**

ABSOLUTE GIFT. See **THELLUSSON ACT.**

ACCUMULATION. See **THELLUSSON ACT.**

ACQUIESCENCE. See **BANKRUPT**, 2.

ACT OF BANKRUPTCY: See **BANKRUPT**, 2.

ADEMPTION.

A bequest of a share of residue for the benefit of the testator's son and his family may be adeemed wholly or partially by a subsequent advance, by way of settlement, on the son's marriage; and such a settlement may, having regard to the provisions of the will, so operate, rather than as an ademption of an absolute pecuniary legacy. — *Montefiore v. Guedalla*, 98.

ADJUDICATION. See **BANKRUPT**, 1.

ADMINISTRATION SUIT. See **PRACTICE**. **WILL**, 1.

ADVANCE. See **ADEMPTION.**

ADVERSE CLAIMANT. See **LANDS CLAUSES ACT.**

AFFIDAVITS. See **PATENT**. **PLEADING.**

AGREEMENT.

Upon the construction of an agreement to demise a farm for fourteen * years, "at the yearly rent of 40*l.*, payable quarterly, free of * 668 all outgoings;" and by which the parties agreed "to grant and accept a lease on the above and other usual terms:" *Held*, that the landlord was entitled to a net rent, payable free of land-tax and tithe commutation rent-charge. — *Parish v. Sleeman*, 326.

See **VENDOR AND PURCHASER**, 1.

ANNUITY. See **DEED**. **EAST INDIA COMPANY.**

APPEAL. See **MORTMAIN ACT.**

APPOINTMENT. See **POWER**, 2.

ARRANGEMENT. See **BANKRUPT LAW**. **BANKRUPT**, 2.

ASSIGNMENT. See **BANKRUPT**, 2.

ATTACHMENT. See **ENROLMENT.**

ATTORNEY. See *BANKRUPT*, 1.

AUTHORITY. See *BANKRUPT*, 1.

BANKRUPT.

1. Where a person on leaving this country has authorized another, either in writing or verbally, to act for him generally in his absence, the latter has authority to instruct a solicitor to appear on behalf of the former to show cause against an adjudication of bankruptcy against him. — *Ex parte Frampton, In re Frampton*, 263.

2. The execution by a trader of a deed of assignment of all his estate and effects for the benefit of his creditors, although purporting to be made under the arrangement clauses of the Bankrupt Law Consolidation Act, is an act of bankruptcy of which any creditor who has not executed or assented to the deed may, prior to its execution by the required majority of six-sevenths in number and value of the creditors, avail himself in support of his petition for adjudication of bankruptcy against the trader. But where a creditor had advised the trader respecting a sale under such a deed: *Held*, that the creditor had acquiesced in it so as to be precluded from treating it as an act of bankruptcy. — *Ex parte Alsop, In re Rees*, 289.

3. A bankrupt partner falsified the books of the firm, not with the view of any pecuniary advantage to himself, but in order to conceal from his partners a state of embarrassment in which the partnership affairs were involved, but which was conceived by him to be temporary only, he believing at the time that the concern would ultimately turn out a profitable * one, but that his partners, if they had known the true state of its affairs, would have abandoned it: *Held*, that his certificate had been properly refused, but, under the circumstances, the Court made an order for protection, so far as it might be available.

This Court has jurisdiction to grant protection to a bankrupt pending and before hearing his appeal from the total refusal of his certificate; and where the petition could not, in the ordinary course of business, be heard before the long vacation, and security was given for the bankrupt's restoration to the custody in which he was, at the suit of a judgment creditor, the Court granted protection, notwithstanding the opposition of the judgment creditor. — *Ex parte Nicholson, In re Nicholson*, 270.

4. A bankrupt had, a short time before his bankruptcy, represented to his bankers that he was the owner of three ships in the course of building abroad. Some time afterwards his account with them being largely overdrawn, they prepared an agreement for him to sign, whereby he agreed to mortgage the ships to them for the floating balance. He had previously, however, sold the ships to his brother, subject to an agreement for the payment to himself of any profit on a resale. He signed the proposed memorandum without mentioning the fact of the sale. *Held*, that although the bankers made no further advance on the security of the memorandum, the bankrupt had been guilty of a sup-

pression, which could not be overlooked on the question of his certificate, and that it had been rightly suspended for three years without protection. — *Ex parte Holderness, In re Holderness*, 260.

5. One of two partners, who were agents to a banking company, made false returns to them of the notes in the agents' possession, but without the knowledge of the other partner. On the partners becoming bankrupt: *Held*, that the last mentioned partner ought to have seen to the accuracy of the returns, and had been guilty of negligence, imprudence, and over-confidence, but that it was not a case for the total refusal of his certificate. — *Ex parte Dance, In re Dance*, 286.

BANKRUPT LAW.

In the accounts of an arranging debtor, his stock in trade was valued at 472*l.*, his good credits at 499*l.*, the doubtful at 276*l.*, and the bad at 1808*l.* His debts were 3900*l.* There were uncontradicted affidavits that, if the estate were realized under a bankruptcy, a dividend of 2*s.* in the pound, only, would be paid. A proposal for immediate payment of a dividend of 2*s.* 6*d.* in the pound, and for the delivery of the debtor's own promissory notes for 2*s.* 6*d.* more on a future day, had been assented to by three-fifths of the * creditors. *Held*, that there * 670 was not sufficient ground for disturbing the decision of the commissioner, who declined to confirm the proposal as being not reasonable, and adjudicated the debtor a bankrupt. — *Ex parte Perrins, In re Perrins*, 299.

BARON AND FEME. See **HUSBAND AND WIFE. SETTLEMENT**, 2.

BEGIN. See **MORTMAIN ACT.**

BENEFICE. See **BILL OF REVIEW.**

BILL. See **JURY.**

BILL OF EXCHANGE.

1. The plaintiff accepted a bill for the accommodation of R. R. afterwards compounded with his creditors, who executed a release, in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and R., that his rights against the plaintiff should not be prejudiced. R. died, appointing the plaintiff his executor. The plaintiff, at the request of R.'s widow, renounced probate, and allowed the widow to take out administration, in consideration of which Mrs. R. and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R. on several instruments and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him, and filed his bill against Mrs. R. and her brother for indemnity out of the assets.

Held, that however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating the plaintiff's payment to the bill holder as voluntary, and not made in satisfaction of a legal liability, and that she had therefore no defence to the suit; and that, although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand

which as against his principal was the proper subject of a suit in equity, he was properly made a party to the suit. — *Atkins v. Revell*, 360.

2. A drawer in Louisiana of bills of exchange upon acceptors in London held entitled to prove under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for the 10l. per cent upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills on their return dishonoured and protested for non-payment in Louisiana. — *Walker v. Hamilton*, 602.

- * 671 3. Bills of exchange in the hands of * foreign indorsees for value were accepted in England on the faith of the genuineness of a bill of lading, which was presented to the acceptor with the bills of exchange by the indorsees, but which afterwards proved to have been forged by the drawer. The indorsees were unaffected with notice of the forgery when they obtained the acceptance. In a suit by the acceptor against the indorsees for delivery up of the bills, and an injunction against negotiating or proceeding at law upon them: *Held*, that, on the defendants undertaking to deliver up the bills in the event of the judgment at law being against them, no injunction ought to be granted. — *Thiedemann v. Goldschmidt*, 4.

BILL OF REVIEW.

To sustain a bill of review without a discovery of new facts, the decree sought to be reversed must appear to be contrary to some statutory enactment, or some principle or rule of law or equity recognized and acknowledged or settled by decision, or to be at variance with the forms and practice of the Court.

Held, by the Lord Chancellor and Lord Justice TURNER, that the Statute 5 Vict. c. 27 (sess. 2), for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices upon farming leases, does not restrict any power of leasing which the incumbent before possessed. — *Green v. Jenkins*, 454.

BUILDING. See COVENANT.

BUILDING SOCIETY.

The decision in *Fleming v. Self*, 3 De G., M. & G. 997, as to mortgages to building societies, is binding on the Court, and extends to the deduction of redemption moneys paid in by the mortgagor, although that point is not expressly referred to in the judgment.

Where a mortgagee improperly resists redemption, and on taking the accounts a balance is found to be in his hands, the Court has power to charge him with interest on such balance, though he has not been in possession of the mortgaged premises. — *Smith v. Pilkington*, 120.

CALL. See ILLEGAL DEALING.

CAPTAIN. See SHIP.

CERTIFICATE. See BANKRUPT, 3, 4, 5.

CHARGE. See LEGACY, 2.

CHARITY. See MORTMAIN ACT. TRUST.

CHILDREN. See WILL, 8.

* CHOSE IN ACTION. See LIEN.

* 672

CHURCH BUILDING. See MORTMAIN ACT.

CLASS. See WILL, 3.

CODICIL. See LEGACY, 1.

COMMISSION OF LUNACY. See LUNACY.

COMMITTEE.

On the death of the tenant for life of an estate in 1849, the estate, according to one view of the construction of a will disposing of it, devolved upon C. as trustee for Mrs. V.; according to another view it devolved upon W., a lunatic, the committee of whose estate C. was. Mr. and Mrs. V. entered into occupation of part of the estate, and C. received the rents of the remainder and paid them over to Mrs. V., with full notice that the persons who would, according to the second view of the construction, become entitled on the death of W., intended to assert their title. W. died in 1851. A bill was afterwards filed in 1856 by W.'s personal representative to compel C. to account for the rents received by him.

Held, that whether C., if he had not been committee of the lunatic, would have been liable so to account or not, his having filled that position made him clearly liable so to account. — *Wright v. Chard*, 567.

COMPANY. See CONTRIBUTORY. INJUNCTION. LANDS CLAUSES ACT. MISREPRESENTATION, 2.

COMPETING SUITS. See PRACTICE.

COMPOSITION. See BILL OF EXCHANGE, 1.

CONFLICT OF LAW. See JURISDICTION.

CONSENT. See POWER.

CONSTRUCTION. See AGREEMENT. DEED. THELLUSSON ACT. WILL, 1, 2, 3, 5, 6, 8.

CONTRACT. See MISREPRESENTATION, 2.

CONTRIBUTORY.

A mining company, the shares in which passed by delivery of the certificates, being in difficulties, a shareholder, who was desirous of avoiding liability, delivered his shares to a broker, and shortly afterwards introduced to him P., who bought them at the market price, and paid for them by handing to the broker some bank shares standing in P.'s own name, which * the broker sold, and after retaining the price of * 673 the mining shares, handed over the balance to P. The certificates of the mining shares were at the same time delivered to P. A few days afterwards an order was made for winding up the mining company. P. was a clerk in the employ of H., and upon investigation it turned out that the bank shares, though standing in P.'s name, belonged to H.

Held, that the transfer of the mining shares to P. must be regarded as merely colourable, and that the name of H. must be retained on the list of contributories. — *In re The Mexican and South American Company, Hyam's Case*, 75.

See ENROLMENT. JOINT-STOCK COMPANY, 2.

CORPUS. See DEED.

COSTS.

The general rule, that upon taxation of costs as between party and party, the briefs of more than two counsel shall not be allowed, is not inflexible.

— *Pearce v. Lindsay*, 573.

See LANDS CLAUSES ACT. PLEADING. WILL, 1.

COVENANT.

The defendant held two plots of building land, B & C, under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B a sea view over plot C. H. having entered into a treaty with the defendant for an underlease of B, made inquiries of the defendant as to what could be built on the land in front. The defendant replied that he the defendant could not build on C closer than thirty feet, as his lease did not allow it. H. after having inspected the original lease took an underlease of B, containing a covenant by the defendant that he, his executors, administrators, and assigns, would observe the lessee's covenants in the original lease. The defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on C in a way which would obstruct the sea view from houses on B belonging to the plaintiff, who was the assignee of H.

Held, that the rights of H., under the defendant's covenant to observe the covenants in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants.

Held, further, that even if by reason of the surrender the covenant was gone, the plaintiff was entitled to an injunction on equitable grounds, for that what the * defendant had said to H. amounted to a representation, that the defendant could not during the term of his lease build otherwise than in a particular way, which representation he was bound to make good.

* 674

Jorden v. Money, 5 H. L. Cas. 185, explained. — *Piggott v. Stratton*, 33.

CREDITORS' DEED. See BANKRUPT, 2.

CREDITORS' SUIT. See PRACTICE.

CUMULATIVE. See LEGACY, 1.

DAMAGES. See BILL OF EXCHANGE, 2. MISREPRESENTATION, 1.

DEBT. See WILL, 8.

DEBTOR. See BANKRUPT LAW. BILL OF EXCHANGE, 1. INSOLVENT.

DECREE. See PRACTICE.

DEED.

By a trust-deed the trustees were empowered, by sale or mortgage of the trust estates, to pay specified debts, and, secondly, the mortgages on the trust estates, with a direction, "out of the rents or any other

moneys held by them upon the trusts of the deed," to pay an annuity to A. until the mortgages should be paid off: *Held*, upon the import of the whole instrument, that "other moneys" had reference to those *ejusdem generis*, and that the annuity was payable out of income only. — *Clifford v. Arundell*, 307.

DEED OF ARRANGEMENT. See BANKRUPT, 2.

DEEDS. See VENDOR AND PURCHASER, 2.

DEFECTIVE ENUMERATION. See WILL, 6.

DELAY. See LIEN.

DISCHARGE. See INSOLVENT.

DISMISSAL. See JURY.

DOUBTFUL TITLE. See VENDOR AND PURCHASER, 1.

DUTY. See LEGACY, 1.

EAST INDIA COMPANY.

A fund was created for providing retiring pensions of 1000*l.* a year * for civil servants of the East India Company in Bengal, after * 675 twenty-five years' service. The fund was derived from the accumulations of a deduction of 4*l.* per cent on the salaries of the civil servants, with an equal amount contributed by the East India Company. A scale of the values of the annuities, according to the ages of the annuitants, was fixed, and a civil servant retiring with an annuity, if the amount subscribed by him, together with its accumulations, were less than one-half of the tabular value of his annuity, was bound to make up the deficiency. The contrary happened to the plaintiff, whose subscription amounted to considerably more than half the value of the annuity. *Held*, that he was not entitled to have the excess refunded. — *Boldero v. The East India Company*, 313.

EAST INDIA NEW STOCK. See INVESTMENT.

ECCLESIASTICAL BENEFICE. See BILL OF REVIEW.

EJUSDEM GENERIS. See DEED.

ENROLMENT.

Order made *ex parte*, under 21 & 22 Vict. c. 60, §§ 12, 13, for the enrolment of an order of the Court of Session in Scotland directing payment by contributories of a sum of money, or in default attachment. — *In re The Western Bank of Scotland*, 1.

EQUITABLE ASSIGNMENT. See LIEN.

EQUITABLE DEBT. See JOINT-STOCK COMPANY, 1.

EQUITY. See BILL OF EXCHANGE, 1.

ERROR IN NAME. See WILL, 5.

ESTATE FOR LIFE. See WILL, 4.

ESTATE TAIL. See MORTGAGE. WILL, 8.

EVIDENCE. See VENDOR AND PURCHASER, 2.

EXECUTION. See POWER, 1.

FALSIFICATION OF BOOKS. See BANKRUPT, 3.

FIDUCIARY. See COMMITTEE.

FOREIGN COUNTRY. See INJUNCTION. JURISDICTION.

FOREIGN LAW. See BILL OF EXCHANGE, 2.

* 676 * FORGERY. See BILL OF EXCHANGE, 3.

FRAUD. See COMMITTEE. MISREPRESENTATION, 2. POWER, 2.

FREIGHT. See SHIP.

GUARANTEE. See SURETY.

HEIR-AT-LAW. See WILL, 1.

HUSBAND. See SHIP.

HUSBAND AND WIFE.

Lands were devised to trustees "for the use and benefit of E. T., the rents and profits of which estate she shall receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain any thing authorizing a sale or mortgage, the testatrix directed that no sale or mortgage of the estate or its rents should take place during the life of E. T. E. T. was unmarried when the will was made, but married after the death of the testatrix. *Held*, that she took an estate for life for her separate use, without power of anticipation, and that a mortgage made by her and her husband was therefore invalid. — *Goulder v. Camm*, 146.

See NOTICE. SETTLEMENT, 2.

ILLEGAL DEALING.

A banking company, established by charter, under the 7 & 8 Vict. c. 113, which prohibits such companies from commencing business until half their capital is paid up, carried on business in contravention of the prohibition, and was afterwards wound up under the Winding-up Acts. *Held*, that a call might be properly made in respect of the liabilities incurred in the course of such illegal dealing. — *In re The London and Eastern Banking Corporation. Longworth's Executor's Case*, 17.

INCOME. See DEED.

INCUMBENT. See BILL OF REVIEW.

INDEFINITE TRUST. See TRUST.

INDEMNITY. See BILL OF EXCHANGE, 1.

INDIA. See INSOLVENT.

INJUNCTION.

* 677 A company was formed in California * for purposes connected with land in that country, but nearly all the shareholders were resident in England. A resolution was passed at a meeting of English shareholders, authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitu-

tion of the company. It appearing that there was no intention to create preference shares, except with the sanction of the Californian legislature: *Held*, that an injunction ought not to be granted to restrain the company from acting on the resolution, for that the Court will not in general restrain parties from applying to the legislature, whether of this or of a foreign country. — *Bill v. The Sierra Nevada Lake Water and Mining Company*, 177.

See BILL OF EXCHANGE, 3. COVENANT. INSPECTION. SHIP.

INSOLVENT.

A debtor was discharged in 1833, under the Indian Insolvent Act, 9 Geo. 4, c. 73, from liability to arrest, and afterwards applied to the Court in India, under 4 & 5 Will. 4, c. 79, for a complete discharge, which that Act empowers the Court to grant to any person "who now is, or shall hereafter become, insolvent." *Held*, that a supplementary order for such discharge had been properly made, and was effectual, and that it was not necessary for the order to recite in the words of the latter Act that the insolvent appeared to the Court to have acted fairly and honestly towards his creditors. — *In re Gordon*, 381.

See VENDOR AND PURCHASER, 1.

INSPECTION.

An order having been made on motion before the hearing giving the plaintiff liberty to enter the defendant's ground for the purpose of inspection, and for the same purpose to break up the soil in the manner therein specified. *Held*, on appeal, that the latter part of the order ought to be discharged, it not being according to the course of the Court that such liberty should be given on an interlocutory application before the hearing. — *Ennor v. Barwell*, 529.

INTEREST. See BUILDING SOCIETY.

INVESTMENT.

Sanction of the Court refused to the investment, under section 32 of the Act 22 & 23 Vict. c. 35, of a trust fund in the purchase of India stock, created under the East India Loan Act, 22 & 23 Vict. c. 39. But, *semble*, by the Lord Chancellor (*dubitantibus* the Lords Justices) that a trustee making such an investment on his own responsibility would not be guilty of a breach of trust. — *Ex parte Colne Valley and Halstead Railway Bill*, 53.

* ISSUE. See JURY. WILL, 2, 3, 4.

* 678

JOINT-STOCK COMPANY.

1. An assignee of a judgment debt of less than 50*l.* against a limited company on which execution had issued, with a return of *nulla bona*: *Held*, entitled under a power of attorney contained in his assignment to petition to wind up the company.

Semble, that an equitable debt will support such a petition. — *In re London and Birmingham Flint Glass and Alkali Company, Ex parte Wright*, 257.

2. The Joint-stock Companies Act, 1856, has not taken away the liability of the husband of a female shareholder to be placed on the list of contributories in her right in respect of shares belonging to her, but in respect of which he has done no act to make himself a member of the company.

Mrs. L. was, before her marriage, the registered owner of shares in a banking company. Upon her marriage a settlement was executed, by which the shares were assigned to trustees upon trusts excluding the husband, but the trustees did not accept the trusts, and the shares continued registered in the lady's former name. It was not proved that the company had notice of the marriage or of the settlement. The company was afterwards registered under the Joint-stock Banking Companies Act, 1857, and wound up under the Joint-stock Companies Acts of 1856 and 1857.

Held, that the name of the husband in right of his wife must be placed on the list of contributories as well as that of the wife.

Seem, notice to the company of the marriage and of the settlement would not have altered the case. — *In re Northumberland and Durham District Banking Company. Luard's Case*, 533.

See CONTRIBUTORY. ENROLMENT. ILLEGAL DEALING. INJUNCTION. MISREPRESENTATION, 2.

JOINT TENANCY. See WILL, 3.

JOINT TENANTS. See WILL, 2.

JURISDICTION.

A policy was effected with an assurance company carrying on business both in Edinburgh and London, and after the death of the insured, the insurance money was claimed on the one hand by a mortgagee in England, and on the other by a trustee under a Scotch sequestration. The trustee raised an action of "count and reckoning" in the Court of Session in Scotland, and the mortgagee instituted * a suit in the Court of Chancery in England, each of them being a party to the litigation commenced by the other. An order was made in the suit for payment of the policy-moneys into Court, without prejudice to letters of arrestment which had issued in Scotland. By the decree in the suit an account was directed of what was due to the mortgagee on his securities, and he was declared entitled to a lien on the policy-moneys for what should be so found due. The trustee attended before the chief clerk on the taking of the accounts, and on further consideration the moneys in Court were ordered to be paid to the mortgagee. *Held*, on appeals by the trustee, from the interlocutory order and decrees, that the appeals ought to be dismissed, the Lord Chancellor holding that the appellant had acquiesced in the decrees by attending before the chief clerk, and the Lords Justices holding (*dissentiente* the Lord Chancellor) that the circumstance of the action in Scotland having been brought to an issue before the commencement of the suit in this Court, was not a ground for refusing to make the order and decrees under appeal. — *Venning v. Loyd*, 193.

See MISREPRESENTATION, 1.

JURY.

Bill for specific performance dismissed, although an issue had been tried and had resulted in a verdict for the plaintiff, the Court being of opinion that the agreement was one of which specific performance could not be decreed, and that the issue ought not to have been directed.

Semble, by L. J. TURNER, that the Court ought not, before the hearing, to direct an issue to be tried by a jury in this Court under the Statute 21 & 22 Vict. c. 27, unless by consent of counsel on both sides. — *Morrison v. Barrow*, 633.

LACHES. See LIEN.

LANDLORD AND TENANT. See AGREEMENT.

LANDS CLAUSES ACT.

In orders under the Lands Clauses Act, directing a company to pay costs, the omission of the usual words, "except such costs (if any) as are occasioned by litigation between adverse claimants," ought not to be ordered except in very clear cases.

The words "such as are occasioned by litigation between adverse claimants," in the 80th section of the Lands Clauses Act, refer to "costs," and not to the next antecedent, "proceedings." Land devised by the will of J. C. was taken by a railway company, and the money paid into Court. * Adverse claims to it arising under his will, the devisees * 680 appeared by separate counsel on a petition for payment of it out of Court, and argued the question arising between them. *Held*, that the case was not one where the words of exception could properly be omitted from the order. — *In re Cant's Estate*, 153.

LEASE. See AGREEMENT. BILL OF REVIEW.

LEGACY.

1. Legacy given *simpliciter* by a codicil to a legatee to whom another legacy was given by a prior codicil, held to be cumulative and payable out of the same funds and upon the same conditions, including exemption from legacy duty. — *Johnstone v. The Earl of Harrowby*, 183.
2. A testator gave all his real and personal estate to his wife for life, and after her decease to his son absolutely, chargeable with the payment of a legacy of 200*l.* to the testator's daughter, within six months after his decease, and with the payment of the testator's debts and funeral and testamentary expenses. There was no personal estate: *Held*, that the legacy was charged on the life-interest as well as on the remainder of the real estate, and ought, with the arrears of interest for six years, to be raised by mortgage of the property, and that the remainder-man ought to be recouped out of the rents and profits to the full amount of the arrears of interest raised out of the estate. — *Makings v. Makings*, 355.

See ADEMPMENT. MORTMAIN ACT. WILL, 5.

LEGISLATURE. See INJUNCTION.

LENGTH OF TIME. See LIEN.

LESSOR AND LESSEE. See COVENANT.

LETTERS-PATENT. See PATENT.

LIEN.

L., a partner in the firm of B. & Co., retired from it, and shortly afterwards borrowed from the plaintiffs 20,000*l.* on his promissory note payable on 31st May, 1848, and agreed by way of collateral security to give them a lien on his share of the assets of the partnership, which had not yet been ascertained and paid. In furtherance of this, B., one of the continuing partners, in July, 1847, at L.'s request, and with the consent of the other continuing partners, gave the plaintiffs an order on C. & Co., the agents of B. & Co., directing them to pay to the plaintiffs, out of the funds of B. & Co. in their hands, the sum of 5000*l.*, * and engaged to pay to the plaintiffs the residue of L.'s share. C. & Co. had not at the time, nor afterwards, nearly so much as 5000*l.* of B. & Co.'s money in their hands. In August, 1847, the plaintiffs presented the order to C. & Co., and were informed they had not funds to pay it. The plaintiffs gave B. no notice of this. In September, 1847, C. & Co. became insolvent, without having paid any part of the 5000*l.* The promissory note was dishonoured. B. died in February, 1849. The share of L. was finally ascertained in 1853, and L. died in March, 1855. In November, 1855, the plaintiffs filed this bill to enforce their lien.

Held, that the equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange, and that as the plaintiffs could not have obtained payment of the 5000*l.* from C. & Co., they could not be charged with that sum.

Held, also, that the plaintiffs were not under the circumstances barred from relief by delay, there being no statutory bar.

Held, also, that the loss occasioned by the failure of C. & Co. having money of B. & Co. in their hands, was to be treated as a loss of the new firm of B. & Co. not affecting the share assigned to the plaintiffs. — *Glyn v. Hood*, 334.

LIFE-ESTATE. See LEGACY, 2. WILL, 4.

LIMITATIONS.

G. G. by his will bequeathed all his property to H. G. upon the trusts thereafter mentioned. He then bequeathed his leaseholds to H. G. for life, and after her death he gave part of them to M. B. for life, with remainder to G. G. the younger absolutely, and gave the residue of his property to G. G. absolutely, and appointed H. G. his executrix. G. G. the younger survived the testator, and died intestate in March, 1838. H. G. took out administration to his estate in May, 1838, and died in 1841, appointing M. B. her executrix, who thus became the representative of the testator as well as of H. G. M. B. afterwards took out administration to G. G. the younger. One of the next of kin to G. G. the younger in December, 1858, filed a bill against M. B. for the administration of the estate of G. G. the younger.

Held, that M. B. could not avail herself of any defence founded on the Statutes of Limitations, but that an account of the rents of the lease-

holds received by M. B., which was not limited to six years before the filing of the bill, and an account of the personal estate of G. G. the younger, received by H. G. and M. B., respectively, had been rightly directed against M. B.

Per the Lord Justice TURNER. — A demand against the assets of a deceased trustee or personal representative for a breach of trust or misappropriation committed by *him is not barred by a lapse of six * 682 years after his death. — *Obee v. Bishop*, 137.

See MORTGAGE.

LIMITED COMPANY. See JOINT-STOCK COMPANY.

LOCALITY OF DEBT. See WILL, 8.

LUNACY.

Two petitions for a commission of lunacy were presented, one by the wife of the lunatic, the other by a nephew jointly with his wife, who was the daughter of the lunatic by a former marriage. The petition of the nephew and his wife was the earlier in date. *Held*, that a wife is not entitled to any preference over a child of the alleged lunatic as to the conduct of proceedings under a commission of lunacy, and that it not being shown that there was any impropriety on the part of the nephew and daughter, or that the petition of the wife was preferable, the conduct of the proceedings ought to be given to the nephew and daughter as having presented the earlier petition. — *In re Wood*, 142.

See COMMITTEE.

MARRIAGE. See SETTLEMENT, 1.

MARRIED WOMAN. See HUSBAND AND WIFE. SETTLEMENT, 2.

MINING COMPANY. See CONTRIBUTORY.

MISREPRESENTATION.

1. On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for 98 years and a half, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor being apprised of the requisition and of its object, signed the required intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease, which was then mortgaged by the borrower to the lender. It turned out that the lessor had some time before demised the same premises for the same term to the borrower, by whom it had since been assigned for value. *Held*, that the Court had jurisdiction to direct repayment by the lessor to the lender of the sum he had advanced with interest, and that it was a proper case for the exercise of such jurisdiction, although the lessor was not shown to have been guilty of fraud, or of having done more than forgotten the previous lease when he granted the second. — *Slim v. Croucher*, 518.
2. The plaintiff being desirous of purchasing from the directors of a colonial company some forfeited shares, applied at the office for information about the company. Grants of land, appearing on the face of them

- * 683 to be absolute, had been made by the colonial government * to the company. The secretary showed these grants to the plaintiff, and handed him the last two reports of the company, both of which proposed dealing with the land in a way which assumed it to belong absolutely to the company. An Act had been passed containing a clause defeating the title of the company to the land, if the railway, which was still unfinished, was not completed by a given time. There was some question whether later Acts did not control the operation of this clause, but the company had been advised by counsel that they did not. This opinion was not communicated to the plaintiff, nor was he informed of there being any question whether the title was defeasible. The secretary handed him a complete bound-up copy of the Acts relating to the company, which he there and then cursorily looked at, but did not notice the Act containing the divesting clause. He proposed to return and look at the Acts more carefully, but the secretary gave him another bound-up copy of the Acts to take away, and he therefore made no further examination of the set first shown him. The copy he took away did not contain the Act in question. The plaintiff some days afterwards made, through the secretary, a proposal to purchase shares, which was accepted by the directors, and the purchase was duly completed. After this the plaintiff discovered the imperfection of the title.

Held, that the showing to the plaintiff these reports and grants amounted to a representation that the title of the company to the land was indefeasible, and that having regard to these representations, and to the omission of the divesting Act from the set which plaintiff took away, he was not to be considered as furnished with sufficient means of discovering the truth.

Held, also, that the purchase being a purchase from the directors, and the secretary being the agent of the directors in the matter of the sale, the company were liable for the misrepresentations, and that the plaintiff was entitled to have the contract rescinded.

Held, that such right was not lost by the fact that the plaintiff, before the bill was filed, rested his right to rescind solely upon another ground, upon which the Court did not decide in his favour.

The reports shown to the plaintiff stated the monthly traffic returns from the completed part of the line to exceed the expenditure. This was true at the time of the report, but since that time the expenditure had almost always exceeded the returns. This fact was not mentioned to the plaintiff. Whether this suppression would not have entitled him to relief, *quære*. — *Conybeare v. The New Brunswick and Canada Railway and Land Company*, 578.

MISTAKE. See SETTLEMENT, 2.

- * 684 * MISTAKEN REPRESENTATION. See SURETY.
MORTGAGE.

A mortgagee in fee, who had been in possession for more than twenty years, died in 1805, leaving a will, by which he devised the property to S. R., his eldest son in tail, with divers remainders over, and appointed him

his executor and residuary legatee. In 1812, the person claiming under the will of the mortgagor filed a bill against S. R. to redeem, and the suit was compromised in 1814 on the terms of S. R. paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will. *Held*, that his heir-at-law was entitled to the equitable fee, and that the remainder-men under his father's will had no title in equity. — *Pendleton v. Rooth*, 81.

See BUILDING SOCIETY. HUSBAND AND WIFE. SHIP.

MORTMAIN ACT.

In 1851 a lady of large property granted by deed, in manner prescribed by 9 Geo. 2, c. 36, two acres of land, of the yearly value of about 3*l.*, to trustees upon trust to permit a church, parsonage, and school to be built thereon, with power for the persons who should provide funds, to make regulations as to the use of the land for those purposes. She did this with the intention of leaving money by will for those purposes. She died in 1857, leaving a will, by which she gave large legacies for the building and endowment of the church and school. The deed remained in her possession till a short time before her death, and there was some evidence to show that during her life she retained the use of the land.

Held, on the construction of the deed, that there was not any resulting trust for the grantor until the church was built, and that the deed therefore was not upon the face of it void under 9 Geo. 2, c. 36, as containing a reservation for the benefit of the grantor.

Held, that a grantor's retaining such a deed in his possession, and continuing in the occupation of the land, are not conclusive evidence of the existence of an agreement or understanding between him and the trustees, that he shall retain the benefit of the land for his life, but only evidence to which more or less weight is to be attached according to the circumstances of the case; and that under all the circumstances of the present case, and having regard to the opposing evidence, those facts were insufficient to establish the existence of such agreement or understanding, and that the deed therefore was not invalid under 9 Geo. 2, c. 36, on the ground of a secret * trust for the benefit of the grantor. * 685 *Held* accordingly, that the deed was valid, and that gifts of the legacies had not failed.

Semble, that if the grant had been invalid under 9 Geo. 2, c. 36, it would nevertheless have been supported by 43 Geo. 3, c. 108, and 4 & 5 Vict. c. 38.

Semble, that under those Acts it is not necessary that a grantor should part with his whole interest in the land.

A decree having been made declaring the deed and legacies void, and directing the usual accounts of the real and personal estate of the testatrix, a defendant, who was one of the trustees of the deed, and one of the executors, appealed from so much of the decree as declared the deed and

the charitable legacies void. *Held*, that the plaintiff was not entitled to begin. — *Fisher v. Brierly*, 643.

MOTION. See INSPECTION.

NOTICE. See JOINT-STOCK COMPANY, 2.

PAROL EVIDENCE. See WILL, 5.

PARTIES. See PLEADING.

PARTNERSHIP. See LIEN.

PATENT.

Where a petition to have the great seal affixed to a patent had been filed and the respondents served with notice two months before the first day of Michaelmas term, for which day the petition was answered, and the respondents only filed affidavits on the morning of that day: *Held*, that they could not be read; and the patent was ordered to be sealed. — *Re M'Kean's Patent*, 2.

PENSION. See EAST INDIA COMPANY.

PERPETUITY. See THELLUSSON ACT.

PETITIONING CREDITOR. See JOINT-STOCK COMPANY, 1.

PLEADING.

New trustees had been appointed under a power in a settlement, but no assignment or transfer had been made to them of the trust fund, which consisted of moneys paid into Court in a suit. *Held*, on a motion for decree in a suit for the execution of the trusts of the settlement, that the new trustees ought to have been made defendants, and an objection for want of parties having been taken by affidavit, no answer having been required to the bill: *Held*, that the plaintiff had been properly * ordered to pay the costs of the day. — *Nelson v. Seaman*, 368.

* 686

POWER.

1. A settlement contained a power which was to be executed by A., with the consent of B., "such consent to be signified by some deed to be executed by him, and not otherwise," to release certain estates from charges in favor of the younger children of A., and substitute others in their stead. The donee of the power executed it by deed, which was not, however, executed by B. till nine months after its execution by A., but evidence was produced that a draft of the deed, purporting to be an execution of the power by A., had been shown to B. before it was executed by A., and that B. had then given his parol consent thereto: *Held*, that the power had been validly executed. — *Offen v. Harman*, 263.

2. In 1813, a married woman who was entitled for life to certain estates, including the L. estate, with a power of appointing them after her death to all or any of her children, appointed them to her eldest son in fee. This appointment was made upon a bargain between the husband and wife and the eldest son, that the estates should be settled, subject to the wife's life-estate, to the use that the husband should receive a rent-

charge for his life, and subject thereto to the use of all or any of the children of the marriage as the husband and wife should jointly appoint, or as the wife, if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820, the husband and wife made a joint appointment, by which they gave the L. estate to the eldest son, and they made slight variations of these dispositions in 1826, reserving on each occasion a power of revocation and new appointment to them jointly, and to the wife if surviving. In 1827, the husband died. In 1829, the widow, in exercise of all powers vested in her, made some slight variations of the dispositions made by the deeds of 1820 and 1826, and subject thereto, confirmed the dispositions of those deeds.

Held, that although the appointment of 1813 was invalid as being made on a bargain for the benefit of the husband, and the appointments of 1820 and 1826 were therefore invalid, as made under a power which was ill created, the original power of the wife was well exercised by the appointment of 1829, and that the title of the eldest son to the L. estate was good. — *Carver v. Richards*, 548.

PRACTICE.

The rule, that when two suits are instituted for the administration of the same estate, that shall be prosecuted in which the earlier decree has been obtained, does not apply where it has not been obtained fairly; and the Court held this to * have been the case where, on * 687 the same day of which notice had been given to an executor to appear to an administration summons, he appeared of his own accord at an earlier hour in the Chambers of another Judge, and consented to a decree on a summons then and not previously applied for by another plaintiff. — *Harris v. Gandy*, 13.

See ENROLMENT. JURY. MORTMAIN ACT. PLEADING.

PREFERENCE SHARES. See INJUNCTION.

PRINCIPAL AND SURETY. See BILL OF EXCHANGE, 1. . SURETY.

PUBLIC COMPANY. See CONTRIBUTORY. ILLEGAL DEALING. LANDS CLAUSES ACT. MISREPRESENTATION, 2.

RAILWAY COMPANY. See LANDS CLAUSES ACT.

REAL ESTATE. See WILL, 1.

RE-EXCHANGE. See BILL OF EXCHANGE, 2.

RELATION. See POWER, 1.

RELEASE. See POWER, 1.

REMAINDER. See LEGACY, 2.

REPAIRS. See SHIP.

REPRESENTATION. See COVENANT. SETTLEMENT, 1.

REPUGNANCY. See THELLUSSON ACT.

RESCINDING. See MISREPRESENTATION, 2.

RESIDUE. See ADEMPION.

RETIRING PENSION. See EAST INDIA COMPANY.

REVIEW. See BILL OF REVIEW.

RIGHT TO BEGIN. See MORTMAIN ACT.

SCOTCH ORDER. See ENROLMENT.

SCOTLAND. See JURISDICTION.

SEPARATE USE. See HUSBAND AND WIFE. SETTLEMENT, 2.

SESSION (COURT OF). See ENROLMENT.

* 688 *SETTLEMENT.

1. A father, prior to the marriage of his daughter, in a correspondence with her intended husband, stated that all his property would be equally divided amongst his children at his decease; but in a settlement executed prior to the marriage there was no expression of any such intention: *Held*, that all that was intended to be binding on the father was embodied in the settlement. — *Loxley v. Heath*, 489.
2. By a post-nuptial settlement a wife settled savings of her separate estate upon trusts for herself and her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five without issue, his share should go to the survivor. There was a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, and that the sum to be so added should be subject to the like trusts as the original fund. The wife invested in the names of the trustees, but without communicating the fact to them, various sums, arising partly from accumulations of the dividends and partly from funds derived from other sources; and after the death of the husband, and of both of the sons, without issue, the executor of the survivor of the sons, instituted a suit to have the trusts of the settlement executed. *Held*, that it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement: and *held*, that all the additions were subject to the trusts of it; and there not appearing sufficient probability of her establishing in a cross suit a case of mistake, the Court refused to give an opportunity to institute such a suit. — *Muggeridge v. Stanton*, 107.

SHIFTING CLAUSE. See WILL, 7.

SHIP.

- S. & Co. were owners of seven-eighths of an American vessel, and ship's husbands. T. was the owner of the remaining eighth, and was captain of the vessel, which was despatched on a voyage to Liverpool. Before the voyage, S. & Co. spent a large sum in repairs, and for the purpose, as was alleged, of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from the plaintiffs, and assigned the freight to them by way of security. On the arrival of the vessel in Liverpool, the plaintiffs obtained an injunction to prevent T. from receiving the freight. *Held*, on appeal, that a part owner who is ship's husband has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him; that the legal * right to receive the freight was in the captain; and that in the absence of any sufficient allegation and proof that he was about to misapply it, the injunction ought not to have been granted. — *Guion v. Trask*, 373.

* 689

SHOWING CAUSE. See **BANKRUPT**, 1.

SPECIFIC PERFORMANCE. See **JURY**. **VENDOR AND PURCHASER.**

STATUTE OF LIMITATIONS. See **LIMITATIONS**. **MORTGAGE.**

SURETY.

Upon the eve of a sale by the sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. It appeared that representations were made on behalf of the judgment creditors when they took the guarantee that they had power to stop the sale, and that it would be stopped: *Held*, that the surety was entitled to have the guarantee delivered up to be cancelled:— *Cooper v. Joel*, 240.

See **BILL OF EXCHANGE**, 1.

SURRENDER. See **COVENANT**.

TAXATION. See **COSTS**.

THELLUSSON ACT.

A contingent liability under a covenant executed but not broken by a testator is a debt within the meaning of the provision for payment of debts excepted from the operation of the Thellusson Act.

A testator bequeathed shares in a newspaper to his wife, with a proviso, that if they should be sold, the purchase-money should be placed in the funds, and that she should have the interest for her life; but should she not sell the shares, then whatsoever sum might annually accrue from them above 200*l.* was to be reserved as a kind of sinking fund for the protection of the shares: *Held*, that a large fund which had arisen from the income beyond 200*l.* a year, and which was not required for the protection of the shares, formed capital, and that the widow was entitled only to a life-interest therein. — *Varlo v. Faden*, 211.

TIME. See **LIEN**. **PATENT.**

TITHE. See **AGREEMENT**.

* **TRANSFER.** See **CONTRIBUTORY**.

* 690

TRUST.

A testator bequeathed 2500*l.* to his trustees and executors, to be laid out by them with the concurrence of the persons described in the will as the trustees of Shakspeare's house, in forming a museum at Shakspeare's house, and for such other purposes as the trustees of the will in their discretion should think fit, for the purpose of giving effect to his wishes; and he also gave a rent-charge for the support of a custodian. Shakspeare's house had been purchased by means of the contributions of numerous subscribers, and the testator had by deed vested a sum of money in trustees for the purpose of preserving the house from decay. *Held*, that the gifts in the will could not be supported either as charita-

ble, or for the benefit of private persons. — *Thomson v. Shakespear*, 399.

See DEED. LIMITATIONS. MORTMAIN ACT.

TRUSTEE. See INVESTMENT. PLEADING. WILL, 7.

TWO SUITS. See JURISDICTION.

VENDOR AND PURCHASER.

1. The assignees of an insolvent put up for sale an estate, which had been impressed with the character of personalty, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir, abruptly gave notice to determine the contract, and immediately afterwards bought up the title of the heir. *Held*, that he could not avail himself of this purchase to defeat his contract, but that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir.

Semble, a vendor who *bond fide* puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title.

- If a purchaser is entitled at all to insist that the vendor's having only a partial interest makes the contract void, he must insist upon the objection at once, and cannot avail himself of it after having *treated the contract as good, and required the concurrence of the persons who can complete the title.

* 691

R.'s wife was owner of a remainder in fee, and had issue by R. R. took the benefit of the Insolvent Act in 1850, and a vesting order was made. The remainder came into possession in 1853. In 1854, R. and his wife made an equitable mortgage of the estate to C., who had notice of the insolvency. In 1855 the wife died, and R. became tenant by the curtesy. No further proceedings having been taken to perfect the title of the assignees: *Held*, in a suit by the assignees for specific performance, that the question whether C. had not a valid charge on the estate by the curtesy was sufficiently doubtful to entitle the purchaser to require C.'s concurrence, although a decree for a conveyance to the assignees had been made in another suit, to which C. was a party, in which, however, this point did not appear to have been distinctly put in issue. — *Murrell v. Goodyear*, 432.

2. In a vendor's suit for specific performance the abstract showed a seisin in fee in B. in 1798, and a devolution of the title both legal and equitable from him to the plaintiff, and uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, and that by mesne conveyances the

premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account-books of deceased solicitors who had been concerned in framing the recited deeds, in which charges were made for preparing those deeds and for attending to witness their execution. *Held*, that the recital coupled with the extracts was good secondary evidence of the execution and contents of the missing deeds.

The abstracted deed of 1815 also contained recitals of deeds purporting to be mortgages of the premises in question by B., and subsequent reconveyances to him by the mortgagees. These deeds were also missing, but were abstracted in an abstract produced to the purchaser, which had been made out and examined by a conveyancer in 1815, and from which the recitals in the deed of 1815 had been prepared. *Held*, that the abstract of 1815 was sufficient secondary evidence of the execution and contents of the missing deeds. — *Moulton v. Edmonds*, 246.

VOID CONTRACT. See SURETY.

WIFE. See HUSBAND AND WIFE. SETTLEMENT, 2.

WILD'S CASE. See WILL, 4.

* WILL.

* 692

1. A testator gave all his real estate, situate as described in his will, to trustees, to have and to hold to them and the survivor of them for ever, or otherwise, according to the several and respective natures and tenures thereof on certain trusts: *Held*, that the leasehold as well as the freehold property of the testator at the place mentioned passed.

One of the next of kin of a testator instituted a suit for the administration of his estate, and obtained a decree directing inquiries whether the testator died seised of any freehold estate and, if necessary, who was his heir-at-law. The heir-at-law, on being served with notice of the decree, came in and proved her pedigree: *Held*, that she was entitled to her general costs of so doing. — *Swift v. Swift*, 160.

2. A testator by his will gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one years, for their respective lives; and after the death of any of them, upon trust as to an equal portion of the moiety, proportionate to the number of his children then living, for the use of the issue of such child or children so dying absolutely for ever: *Held*, —

1. That the word "issue" included only children of the testator's children, to the exclusion of their more remote descendants; and —

2. That, pursuant to the intent of the gift, and by analogy to dispositions operating under the Statute of Uses, or of dispositions operating under wills, as distinguished from conveyances operating at common law, the children of a child who died after the youngest child of the testator attained twenty-one took as joint tenants the proportionate share of the deceased child, although their respective interests in the propor-

tionate part vested in them at different times as they respectively came into *esse*. — *M'Gregor v. M'Gregor*, 63.

3. A testator bequeathed his residuary estate upon trust to pay the dividends to his cousin for life: and as to the principal from and after her decease, in trust for all her children who should be living at her decease, and the issue of such of them as should then be dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class as if by representation, and not as individuals. *Held*, by Lord Justice KNIGHT BRUCE (Lord Justice TURNER doubting), that the issue of a child who died in the cousin's lifetime were a class to be ascertained at her death; and *held* by Lord Justice TURNER * 693 that the class, however ascertained, * were to take as joint tenants. — *Penny v. Clarke*, 425.

4. The rule in *Wild's Case*, 6 Rep. 17, is not applicable to personal estate.

Personalty was bequeathed to the testator's daughter during her life, and at her death to her daughter and to the granddaughter's children, but if they should die without issue, then over. The granddaughter was unmarried at the dates of the will and of the testator's death, and had no child till after the death of the testator's daughter: *Held*, that the granddaughter took a life-interest in the subject-matter of the bequest, with remainder to her children. — *Audsley v. Horn*, 226.

5. A testator bequeathed 4000*l.* in trust for his brother for life, and after his decease upon trust to pay or divide the principal sum unto or equally between the child or children of the brother living at his decease except Thomas (his eldest son), and the issue then living of any (except the said Thomas) then dead, such issue taking their parent's share only. It was shown by parol evidence, that Thomas was the youngest son of the testator's brother at his decease; and that, to the testator's knowledge, when he made his will, the eldest son of his brother was possessed of a large fortune, while the youngest and other children were unprovided for. *Held*, that the eldest son, and not Thomas, was the son intended to be excepted. — *Hodgson v. Clarke*, 394.

6. A British subject domiciled in Russia made a will in the Russian language and in Russian form, commencing with the statement that he thereby disposed of his property. He then directed a sale of his landed estates in Russia, which he specified, and proceeded to make a disposition of "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money, and in bank billets, belonging to me." He then closed his will with the statement that as all his property was entirely his own, and acquired by himself, nobody had a right to interfere with or contest his dispositions or those of his executors. It was proved that "bank billets" were a particular kind of Russian negotiable securities. At the time of the testator's death, he had, beside his Russian property, a large sum in the English funds. *Held*, that the words "in ready money and in bank billets" were not merely words of defective enumeration, but a description comprising the whole subject of the gift; that the description of the

gift being clear and unambiguous, the first and last clauses of the will were not sufficient to extend the meaning of that description, and that the testator's property in the English funds was undisposed of. — *Wylie v. Wylie*, 410.

7. Estate T. stood limited to E. T. * for life, remainder to his first * 694 and other sons successively in tail. He had two sons, E. H. T. and R. C. T., and a daughter, Mrs. L. A testator who knew these circumstances devised the L. estate to M. A. T. for life, remainder to E. T. for life; remainder to R. C. T. for life, remainder to trustees to preserve, remainders to his first and other sons successively in tail; remainder to E. H. T. for life; remainder to trustees to preserve contingent remainders in the usual form; remainder to his second, third, and other sons successively in tail male; remainder to Mrs. L. for life, with divers remainders over. The will contained a proviso that if any person thereby made tenant for life or in tail should become seised of the T. estate, the limitations made by the will in his, her, or their favour should determine as if he, she, or they were dead, and the estate should go over to the person next entitled in remainder. R. C. T. died unmarried almost immediately after the testator. Afterwards E. T. died, and E. H. T. thereupon came into possession of the T. estate. M. A. T. next died, and at her death E. H. T. had only one son, but afterwards had a second son, R. B. T. M. A. T. was the heiress-at-law of the testator, and left a will giving all her property real and personal to Mrs. L.

Held, that although, having regard to the way in which the T. estate was settled, the shifting clause if it applied to E. H. T. made it impossible for him in any event to retain any interest in the L. estate, except by means of an alienation of the T. estate in his father's lifetime; this, though aided to some extent by expressions in other parts of the will, was not a sufficient reason for holding the shifting clause not to apply to him.

Held, also, that on the determination of the life-estate of E. H. T. under the shifting clause, the estate did not go over to the next person beneficially entitled, but to the trustees to preserve.

Held, that the trust in favour of E. H. T. was determined as well as his legal life-estate, and that the trustees held the rents accrued after the birth of R. B. T. in trust for R. B. T.

Held, that the rents accrued between the determination of E. H. T.'s interest and the birth of R. B. T. were held in trust for Mrs. L.

Per the Lord Justice TURNER. — The beneficial interest in the estate of the trustees to preserve followed the limitations of the will, and upon the determination of E. H. T.'s beneficial interest there was no resulting trust for the heiress; and Mrs. L. was entitled to the last-mentioned rents directly, and not through the heiress. — *Turton v. Lambarde*, 495.

8. Under a testamentary gift to B. "and his children in succession,"

* *held*, upon the construction of the whole will, that B. took an * 695

estate tail in the freeholds, and an absolute interest in the leaseholds and general personal estate.

Debts due to the testator in respect of collieries belonging to him in the county of N., held to pass under a devise of all land and property belonging to him in the county of N.—*The Earl of Tyrone v. The Marquis of Waterford*, 613.

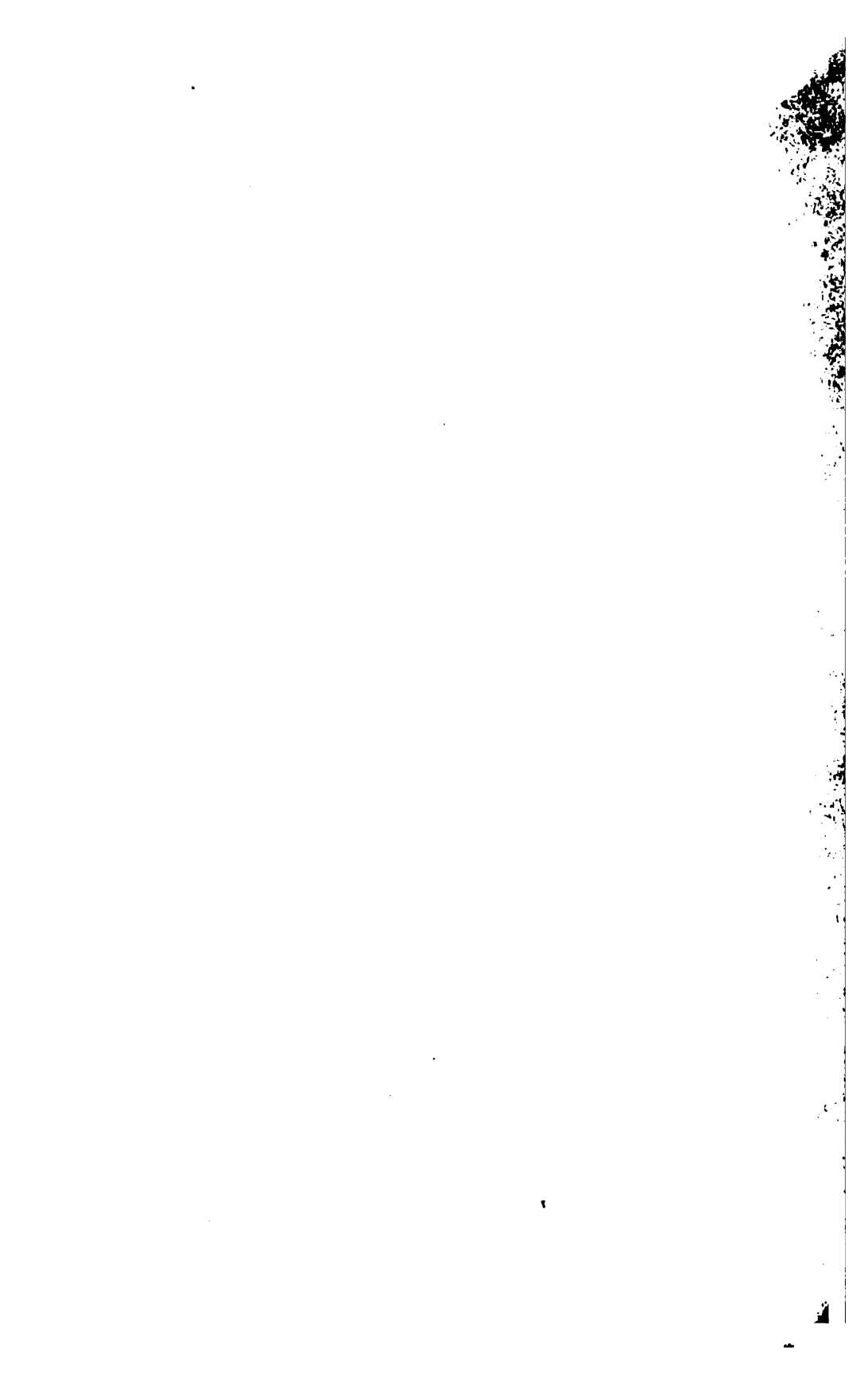
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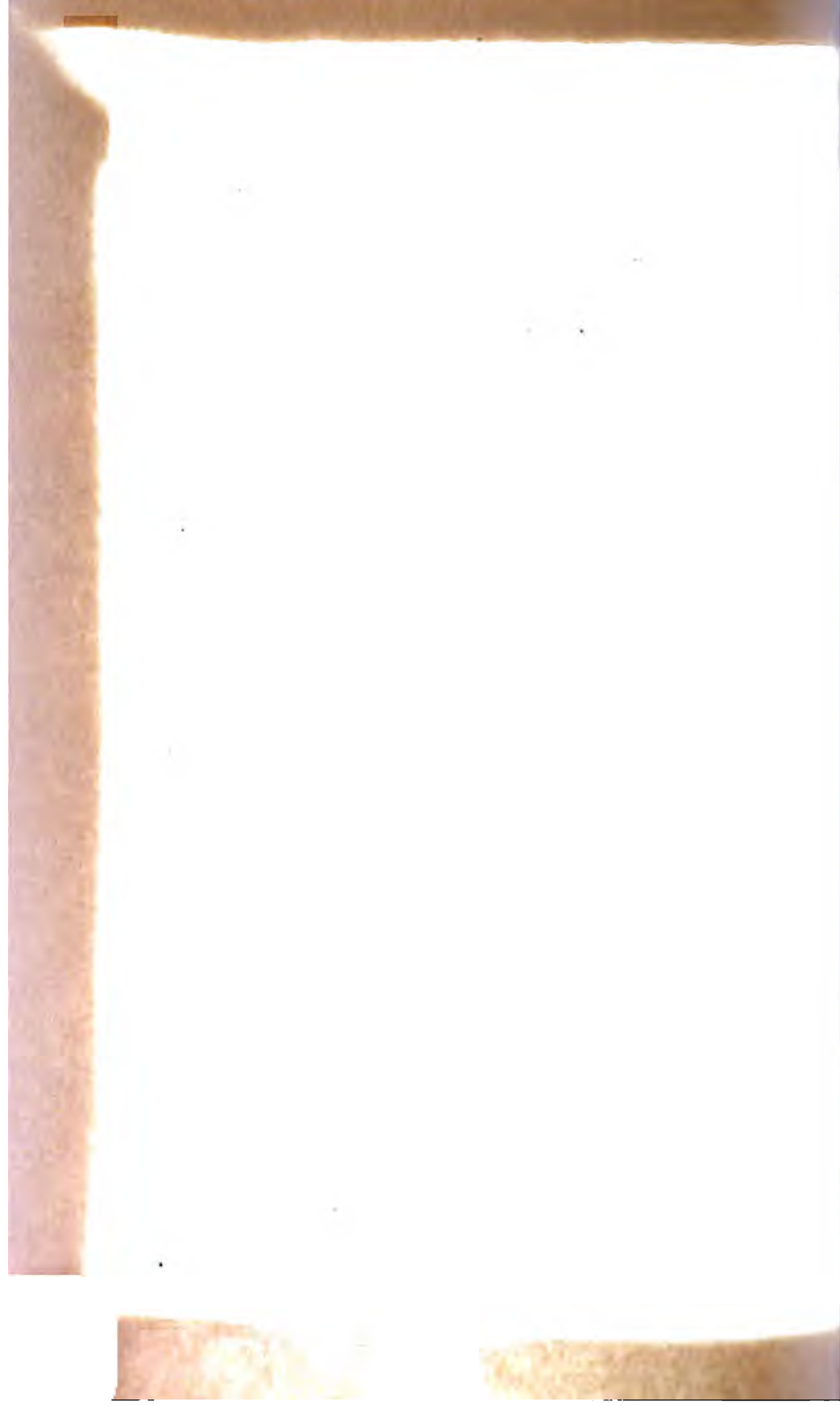
WINDING UP. See JOINT-STOCK COMPANY.

WINDING-UP ACTS. See CONTRIBUTORY. ENROLMENT. JOINT-STOCK COMPANY.

[540]

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